No. 1 1

JOHN T. FEY, Clerk

IN THE

# SUPREME COURT OF FLORIDA

**Appeal From the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida**

**At Law No. 33803**

PIERRE BOURGEOIS,

*Appellant,*

*against*

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

*Respondent.*

## APPENDIX FOR APPELLANT

RASSNER, MILLER & ROTH,
550 Brickel Avenue,
Miami 32, Florida,
*Attorneys for Appellant.*

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# Complaint of July 8, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery No. 181,254

(Case No. 33803)

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PIERRE BOURGEOIS,

Plaintiff,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Defendant.

---

Comes now the plaintiff, Pierre Bourgeois, and sues the defendant, Mercantile National Bank of Miami Beach, Florida, a United States corporation, and for reason therefore says:

1. That the plaintiff, Pierre Bourgeois, is a resident of Dade County, Florida, and is over the age of twenty-one (21) years.

2. That the defendant, Mercantile National Bank of Miami Beach, Florida, is a United States corporation existing under and by virtue of the laws of the United States and at all times hereinafter mentioned was doing business in and about and throughout the State of Florida.

3. That on the 16th of May, 1955, the defendant did accept a promissory note in the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars

($228,570.00) signed by the plaintiff and made payable to Chantiers Navals de la Ciotat, a foreign organization, a copy of which is attached hereto and made a part hereof as though fully set forth herein and marked Exhibit #1, and at all times hereinafter mentioned the defendant held and continues to hold said note.

4. That on the 16th of May, 1955, the defendant by and through its authorized agent, one D. B. Hudson, assistant vice-president, did forward letters to Chantiers Navals de la Ciotat, and to the Banque Fransaise du Commerce Exterieur, copies of which are attached hereto and made a part hereof as though fully set forth herein and marked Composite Exhibit #2, wherein the defendant did offer to guarantee the repayment of said note if the plaintiff should default on the payment of same.

5. That said offer to guarantee was not acceptable to the said Chantiers Navals de la Ciotat and subsequently, on the 23rd day of May, 1955, the defendant did cable the Paris branch of the Chase National Bank, a copy of said cable being attached hereto and made a part hereof as though fully set forth herein and marked Exhibit #3, wherein the defendant did once again renew its offer to guarantee as aforesaid as per its letters of May 16, 1955, being Composite Exhibit #2 hereof.

6. That said offer to guarantee was still not acceptable to the said Chantiers Navals de la Ciotat, and subsequently, on May 27, 1955, the defendant did cable the said Chantiers Navals de la Ciotat a copy of same being attached hereto and made a part hereof as though fully set forth herein, and marked Exhibit #4, wherein the defendant did offer to guarantee the repayment of the note hereto attached being marked Exhibit #1.

7. That on May 30, 1955, the defendant did cable the Banque Fransaise du Commerce Exterieur, the agent of the said Chantiers Navals de la Ciotat, a copy of said cable being attached hereto and made a part hereof as though fully set forth herein and marked Exhibit #5 wherein the defendant did renew its offer to guarantee as per the cable of May 27, 1955, to the said Chantiers Navals de la Ciotat hereto attached as Exhibit #4.

8. That in reliance upon the good faith of the defendant's offer to guarantee contained in the cables of May 27, 1955, and May 30, 1955, being Exhibits #3 and #4 and by way of acceptance of said offer to guarantee the said Chantiers Navals de la Ciotat did cause to be transferred the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) to the account of the defendant with directions to the defendant to transfer said sum to the account of the plaintiff, Pierre Bourgeois.

9. That by reason of the foregoing the aforesaid sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) became the property of the plaintiff, Pierre Bourgeois.

10. That the plaintiff has made due demand upon the defendant to turn over to him the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) the same being his property and at all times hereinbefore mentioned has exercised dominion and control over same, and the defendant willfully, wrongfully, and wantonly continues to exercise dominion and control adverse to the plaintiff over his said property.

11. That the defendant has refused and continues to refuse to transfer the said sum to the account of the plaintiff.

12. That by reason of the wrongful acts of the defendant as aforesaid, the plaintiff has been deprived of the use of his property and same has been converted to the use of the defendant.

13. That the plaintiff is entitled as a matter of law and equity to have said funds transmitted to him forthwith.

14. That by reason of the wrongful acts of the defendant as aforesaid, the plaintiff has been prevented from proceeding with the building of various tankers as per contracts existing between the plaintiff and the said Chantiers Navals de la Ciotat involving approximately Twenty Five Million Dollars ($25,000,000.00).

15. That said contracts for the building of tankers involve a subsidy heretofore granted by the French government in the sum of approximately Nine Million Dollars ($9,000,000.00) subject to withdrawal for good cause shown such as undue delay.

16. That the plaintiff will suffer irreparable harm if the aforesaid sum wrongfully held by the defendant is not transferred forthwith to him in that the French government has threatened to withdraw the said subsidy unless prompt action be taken to complete said contracts and all action has been stopped due to the wrongful acts of the defendant as aforesaid.

WHEREFORE, plaintiff prays:

1. That this Honorable Court take jurisdiction of the subject matter of this cause and the parties hereto.

2. That a mandatory injunction issue forthwith directing the defendant to turn over to the plaintiff the sum

of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) being the property of the plaintiff wrongfully held by the defendant.

3. That a restraining order issue forthwith restraining the transfer of the said sum to any third party pending final hearing of this cause.

4. That the Court appoint a receiver for the said sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) now in the possession of the defendant so as to bring same into custodia legis.

5. That this Honorable Court decree that the said sum be the property of the plaintiff, Pierre Bourgeois, and that he be entitled to immediate possession of same.

6. That this Honorable Court grant all other and further relief that to this Court shall seem proper in good conscience and equity.

(Verified by Pierre Bourgeois.)

MONTE K. RASSNER,
550 Brickell Building,
Miami, Florida,

and

ERSTLING & EHRICH,
990 S. W. 1st Street,
Miami, Florida,
Attorneys for Plaintiff,

By .....,
of Counsel.

## Answer and Cross-Bill of July 12, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery—No. 181254

---

[SAME TITLE]

---

COMES NOW the defendant, Mercantile National Bank of Miami Beach, Florida, a United States banking corporation, by its undersigned solicitors, Broad and Cassel, and files this, its answer and cross bill in the above entitled and styled cause, and thereupon, says as follows, to-wit:

ANSWER

1. Answering paragraph 1, the defendant states that it is without knowledge as to whether or not the plaintiff, Pierre Bourgeois, is a resident of Dade County, Florida, and demands strict proof of such allegation; and the defendant admits that the plaintiff is over the age of twenty-one years.

2. The defendant admits that the allegations in paragraph 2 contained are true.

3. Answering paragraph 3, the defendant states that the plaintiff did deliver to the defendant an instrument in writing of which Exhibit 1, attached to the complaint, is a copy, and admits that the defendant holds the said instrument, but the defendant avers that the said instrument is not a negotiable promissory note and is not a negotiable instrument for the reason that same does not

contain a maturity date for the obligation therein referred to, and that in the absence of a stipulated maturity the said instrument does not constitute a promissory note or a negotiable instrument. The defendant herewith offers to return the alleged note to the plaintiff and makes tender thereof to this Honorable Court.

4. Answering paragraph 4, the defendant admits that one, D. B. Hudson, executed the two letters as referred to in said paragraph numbered four, and referred to as Exhibit 2 attached to the complaint, and admits that the said letters were dispatched to the addressees referred to therein, but the defendant denies that it offered to guarantee the repayment of the note referred to by the plaintiff, if the plaintiff should default on the payment of same; and the defendant alleges that the plaintiff never requested the defendant to guarantee the repayment of the said note if the plaintiff should default on the payment of same, but only requested the defendant to agree to act as transmittal agent of the funds to be supplied by the plaintiff for delivery to Chantiers Navals Delaciotat through the Banque Francaise Du Commerce Exterieur; that since the 16th of May, 1955, the plaintiff has individually and through agents and counsel of the plaintiff, insisted that notwithstanding all of the letters and cables involved in the matter, that the defendant is not and was not liable as a guarantor of the obligation referred to; that in addition, a national bank, and the defendant is a national bank, cannot become guarantor in the manner referred to in the said paragraph 4 in the said complaint, and such an attempt to become such a guarantor on the part of the Bank would constitute an ultra vires act.

5. Answering paragraphs 5, 6, and 7, the defendant states that it is without knowledge as to what was or was

not acceptable to the said Chantiers Navals Delaciotat, but admits the fact of the existence of the instruments referred to in such paragraphs, excepting that the defendant avers that it did not guarantee nor did it offer to guarantee, nor was it requested of the defendant to guarantee, the repayment of the obligation of the plaintiff, but only that the defendant would undertake to guarantee the transmittal of funds placed in its hands by the plaintiff to the said Chantiers Navals Delaciotat and Banque Francaise Du Commerce Exterieur.

6. Answering paragraph 8, the defendant states that it is without knowledge as to what Chantiers Naval Delaciotat relied upon in causing funds in the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) to be transmitted from France to the United States, but the defendant admits that such funds were transferred from France to the National City Bank of New York, and by that Bank subsequently transmitted to the Chase Manhattan Bank of New York, which Bank placed such funds at the disposal of and to the credit of the defendant; but the defendant avers that it did not accept such funds and has never had possession of such funds. The defendant avers on information and belief that prior to the commencement of this suit, the remitter of such funds called for the return of such funds, and that such funds were, in fact, returned to the remitter at its request.

7. Answering paragraph 9, the defendant denies the allegation therein contained.

8. Answering paragraph 10, the defendant admits that the plaintiff has made demand upon it for the funds, but denies that the funds are the property of the plaintiff and denies that the defendant exercised dominion and control of the said funds, and the defendant denies that it con-

tinues to exercise dominion and control over the funds; and the defendant avers that it does not have possession of the funds, and that it never accepted possession of the funds.

9. Answering paragraph 11, the defendant admits the same.

10. Answering paragraph 12, the defendant denies that the defendant has done any wrongful act and denies that the plaintiff has been deprived of the use of his property, and denies that the funds have been converted to the use of the defendant.

11. Answering paragraph 13, the defendant denies that the plaintiff is entitled as a matter of law and equity to have the said funds transmitted to him.

12. Answering paragraph 14, the defendant denies the doing of any wrongful act and states that it is without any knowledge as to whether or not the plaintiff has been prevented from doing the things alleged in said paragraph 14, and therefore, the defendant denies such allegation.

13. Answering paragraph 15, the defendant avers it is without any knowledge of the allegation therein contained, and therefore denies the same.

14. Answering paragraph 16, the defendant avers that it is without any knowledge as to the allegations therein contained, and therefore denies the same.

*Answer and Cross-Bill of July 12, 1955*

CROSS BILL

COMES NOW the defendant, Mercantile National Bank of Miami Beach, Florida, a national banking corporation, and files this, its cross bill against the plaintiff, Pierre Bourgeois, and thereupon alleges as follows, to-wit:

1. That in the first instance, the plaintiff came to the defendant and requested the defendant to guarantee to Chantiers Navals Delaciotat and Banque De Commerce Exterieur that it would act as transmittal agent for the purpose of transmitting in United States dollars funds to them which would be supplied by the plaintiff; that the letters identified as Exhibit 2 attached to the complaint, were prepared to accomplish that specific purpose. After the transmittal of the letters referred to, subsequent cables and letters were transmitted and received by the defendant, which were necessitated by reason of apparent misunderstanding and language employed in letters and cables sent and received, which misunderstanding was occasioned by the language difference between the English language and the French language, and the possibility in translating technical and commercial terms of producing various interpretations, various meanings and uncertainty. Plaintiff alleges that it appears from the letters and cables that the Chantiers Navals Delaciotat and Banque Francaise Du Commerce Exterieur misunderstood the obligation of the defendant and wrongfully interpreted the obligation of the defendant as that of a guarantor of the repayment of the money, and not merely that of a guarantor solely to transmit funds which it received from the plaintiff. That defendant did not want to accept funds under the mistaken belief that the funds were being transmitted because of and against an obligation or guaranty of the defendant for the repayment of such funds, and so informed the plaintiff.

2. The defendant avers that the plaintiff has made threats to the defendant and has attempted to get the defendant to turn over to the plaintiff by threats, the sum of Two Hundred Twenty Eight Thousand Five Hundred Seventy Dollars ($228,570.00).

3. The defendant avers that it has no liability or responsibility of any nature whatsoever to the plaintiff.

4. The defendant avers that it is not permitted under the laws of the United States to act as the guarantor for the plaintiff's obligation.

WHEREFORE, the defendant prays that this Honorable Court enter a Final Decree herein declaring and determining that the defendant is not obligated or liable to the plaintiff in any sum whatsoever.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA,

By STEPIN BROWN,
Pres.

BROAD AND CASSEL,
By ALVIN CASSEL,
Attorneys for Defendant,
420 Lincoln Road,
Miami Beach, Florida.

(Verified by Stepin Brown, July 12, 1955.)

## Answer to Cross-Bill of August 2, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery—No. 181254

[SAME TITLE]

Comes now the plaintiff Pierre Bourgeois and files this his answer to the cross bill filed by the defendant Mercantile National Bank of Miami Beach, Florida, and says:

1. That he denies each and every allegation of the said cross bill with the exception of the allegations contained in Paragraph one wherein the defendant alleges that various letters and cables were sent and received by it.

WHEREFORE, plaintiff prays that said cross bill be dismissed with prejudice and at the cost of the defendant.

PIERRE BOURGEOIS.

(Verified by Pierre Bourgeois, July 12, 1955.)

## Amended Complaint of August 29, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery—No. 181254

---

[SAME TITLE]

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Comes now the plaintiff Pierre Bourgeois by and through his undersigned attorney and sues the defendant Mercantile National Bank of Miami Beach, Florida, a United States corporation, and for reason therefor says:

That this action is brought for the recovery of damages in excess of Five Thousand Dollars ($5,000.00) exclusive of interest and costs.

AND AS AND FOR A FIRST CAUSE OF ACTION

1. That the plaintiff Pierre Bourgeois is a resident of Dade County, Florida, and is over the age of twenty-one years.

2. That the defendant Mercantile National Bank of Miami Beach, Florida, is a United States corporation existing under and by virtue of the laws of the United States and that at all times hereinafter mentioned was doing business in and about and throughout the State of Florida.

3. That on June 1, 1955, pursuant to instructions from the Banque Fransaise du Commerce Exterieur, of Paris, France, the First National City Bank of New York, transferred to the Chase Manhattan Bank of New York for the

defendant herein the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00), to be credited to the account of the plaintiff with the defendant.

4. That from the date of June 1, 1955, and at all times hereinafter mentioned, the plaintiff was and still is the owner and entitled to the immediate possession of the aforesaid Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars, ($228,570.00).

5. That the plaintiff has made divers demands upon the defendant for portions of the aforesaid Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00).

6. That on the 9th day of June, 1955, the plaintiff demanded that the aforesaid sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) be credited to his account with the defendant, and that the defendant turn over to the plaintiff the aforesaid sum less any reasonable banking charges.

7. That on the 22nd day of June, 1955, plaintiff in writing demanded of the defendant that defendant transfer to the Chase Manhattan Bank of New York, 250 West 57 Street, Branch, the sum of Two Hundred Twenty-eight Thousand Three Hundred Seventy Dollars ($228,370.00).

8. That the defendant has refused to credit the account of the plaintiff in its bank and has refused, and continues to refuse, to remit in compliance with any of the aforestated demands to the plaintiff.

9. That the defendant has converted the aforesaid sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00) to its own use to the plaintiff's damage.

10. That by reason of the foregoing the plaintiff has been damaged in the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00), and

AS AND FOR A SECOND CAUSE OF ACTION

11. That the plaintiff re-alleges and re-affirms each and every allegation set forth in paragraphs numbered one through ten, and the same are hereby incorporated as though fully set forth herein.

12. That on or about May 16, 1955, the plaintiff and defendant entered into an agreement wherein and whereby defendant agreed to receive for the account of the plaintiff from the Banque Fransaise du Commerce Exterieur of Paris, the sum of Two Hundred Twenty-eight Thousand Five Hundred Seventy Dollars ($228,570.00).

13. That the defendant further agreed that upon receipt of the aforesaid funds, it would be held for the account of and placed at the disposal of the plaintiff herein.

14. That for this and other banking services plaintiff was to pay to the defendant the normal reasonable banking charges for similar services rendered by banks in the United States; plaintiff authorized defendant to charge and deduct from his account, when it received in his behalf the aforementioned funds, said reasonable charges.

15. That by reason of the defendant's failure to turn over to the plaintiff the funds received by it for and in his behalf, plaintiff has been prevented from continuing in his regular course of business.

16. Plaintiff has duly performed all the terms and conditions on his part to be performed.

17. That by reason of the foregoing, the plaintiff has been damaged and said damages continue at the rate of Six Thousand Dollars ($6,000.00) per diem.

WHEREFORE, plaintiff prays that damages be assessed against the defendant together with the costs and disbursements of this action.

GERARD EHRICH,
Attorney for Plaintiff,
Biscayne Bldg., Miami, Fla.

## Order of September 2, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery—No. 181254

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[SAME TITLE]

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Upon plaintiff's motion for leave to amend by filing an amended complaint tendered with said motion, said plaintiff and defendant by their attorneys of record, having before me in open court waived trial by jury upon all the claims made by said amended complaint, upon consideration thereof, it is therefore,

CONSIDERED, ORDERED, ADJUDGED AND DECREED, as follows:

1. That plaintiff be and he is hereby granted leave to file instanter his amended complaint tendered with his said motion for leave to amend, and defendant is granted ten (10) days from the date hereof within which to file its responsive pleadings thereto.

2. That plaintiff's claim be and the same is hereby transferred to the law side of this court to be tried as a non-jury case, jury trial upon said claim having been waived by plaintiff and defendant.

3. That the above entitled cause shall stand for trial upon plaintiff's claim and defendant's counterclaim and answers thereto.

DONE AND ORDERED at Miami, Dade County, Florida, this 2nd day of September, 1955.

VINCENT C. GIBLIN,
*Judge.*

## Answer to Amended Complaint of September 2, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

In Chancery—No. 181254

---

[SAME TITLE]

---

ANSWER TO FIRST CAUSE OF ACTION

1. Defendant has no knowledge of the allegations of paragraph 1 of the Amended Complaint.

2. Defendant admits paragraph 2 of the Amended Complaint.

3. Defendant denies paragraphs 3, 4, 5 and 6 of the Amended Complaint.

4. Defendant received a letter dated June 22, 1955 from Plaintiff, a copy of which is attached to this answer and marked Exhibit "A". Except admitting the receipt of Exhibit "A", which speaks for itself, Defendant denies all other allegations of paragraph 7 of the Amended Complaint.

5. Defendant admits paragraph 8 of the Amended Complaint.

6. Defendant denies paragraphs 9 and 10 of the Amended Complaint.

*Amended Complaint on August 29, 1955*

ANSWER TO SECOND CAUSE OF ACTION

7. Defendant incorporates herein all portions of its answer to the first cause of action.

8. Defendant denies paragraphs 12, 13, 14, 15, 16 and 17 of the Amended Complaint.

9. Defendant incorporates herein as a separate defense that the Amended Complaint fails to state a claim against it.

WHEREFORE, Defendant prays that the Amended Complaint be dismissed with costs.

DEFENDANT'S CROSS BILL

Defendant incorporates herein by reference all allegations of its Cross Bill previously served and filed in this cause.

BROAD AND CASSEL,
L. J. CUSHMAN,
Attorneys for Defendant,
420 Lincoln Road,
Miami Beach, Florida,
By LEWIS HORWITZ.

## Exhibit A, Annexed to Amended Complaint

COPY

June 22, 1955

Mercantile National Bank of Miami Beach
420 Lincoln Road
Miami Beach, Florida

Attention: Mr. D. B. Hudson
Mr. Louis C. Adelson

Gentlemen:

Please pay to the Chase Manhattan Bank of New York, 250 West 57th Street, New York Branch, for account of Pierre Bourgeois, $228,570.00 less $200.00 (net $228,370.00 from funds transferred to my account by Banque Francaise du Commerce Exterieur).

Please notify Keesing & Keesing, attorneys, at above address, at the same time as myself.

Yours truly,

/s/ Pierre Bourgeois
Pierre Bourgeois

PB/ps

## Testimony

[1] IN THE

## CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 33803-G

—o—

PIERRE BOURGEOIS,

Plaintiff,

v.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a U. S. corporation,

Defendant.

—o—

Miami, Florida,
Saturday, November 12, 1955.

The above-entitled case came on for hearing before the Hon. Vincent C. Giblin, Judge of the above-styled Court, at his office in the Courthouse, Miami, Florida, on Saturday, November 12, 1955, at 10 o'clock a. m., pursuant to notice.

Appearances:

JACOB RASSNER, Esq.,
FRED PINE, Esq., and
GERARD EHRICH, Esq.,
Attorneys for plaintiff.

---

Numbers in [ ] refer to pages of stenographer's minutes.

L. J. CUSHMAN, Esq., and
LEWIS HORWITZ, Esq.,
Attorneys for defendant.

* * *

[3] Thereupon DANIEL B. HUDSON was called as a witness on behalf of the plaintiff, and having been first duly sworn, was examined and testified as follows:

*Direct examination by Mr. Rassner:*

Q. May I have your name? A. Daniel B. Hudson.

Q. What is your business or occupation? A. I am assistant vice-president, Mercantile National Bank of Miami Beach.

Q. How long have you been associated with the Mercantile National Bank? A. Nineteen years next month.

Q. What are your duties? [4] A. General operational duties.

Q. Do you know Pierre Bourgeois as one of the bank's clients? A. He is not one of the bank's clients.

Q. Was he at any time? A. No, sir.

Q. Did you ever write a letter to the effect that he was the bank's client? A. No.

Q. Did you have any dealings with Mr. Pierre Bourgeois? A. I had several conferences with him; yes, sir.

Q. Did that have reference to certain funds which would be collected for him? A. No; they were not to be collected for him.

Q. Did you ever undertake negotiations for the procurement of the sum of $228,570 and some odd cents for his account? A. There was a letter written at his request and his attorney's request in regard to certain moneys which he said that a shipbuilding company in France by the name of Ciotat was going to advance to him.

Q. When did he so tell you that the French company was advancing this sum of money to him? When did that conversation take place? [5] A. May 18, 1955.

Q. Where? A. The first time I met Mr. Bourgeois was in Wolfie's Restaurant, on the corner of Collins Avenue and Lincoln Road.

Q. Did you receive any document from Mr. Bourgeois representing a sum of money equal to $228,570? A. I did not.

Mr. Rassner: I would like to have this letter marked for identification as Plaintiff's Exhibit 1-A.

(The document referred to was thereupon marked, "Plantiff's Exhibit 1-A.")

*By Mr. Rassner:*

Q. I show you this letter and ask you if that is your original signature? A. It is.

* * *

Q. As a matter of fact, was the sum of $228,570 credited to the account of your bank for Mr. Pierre Bourgeois on [6] or about June 1, 1955? A. It was credited to our account with a New York correspondent under terms and conditions and restrictions which are in direct violation of the proposals made by Mr. Bourgeois and his attorney.

* * *

Q. In any event, there was a certain sum of money credited to Mr. Bourgeois account by a New York bank, recording said amount to your credit on their bank; is that correct?

* * *

Q. What was the name of the New York bank? A. Chase Manhattan Bank.

Q. Where are they located? A. In the City of New York.

Q. What was the form or nature of the communication? A. Communication from Chase Manhattan Bank?

Q. To you; yes. A. That the First National City Bank had credited to our account some $228,570.

* * *

[7] Q. Was that communication in writing or oral? A. The communication was in a straight telegram or night letter, in an uncoded form.

Q. Have you got the letter or telegram with you?

Mr. Cushman: I will produce it.

The Witness: May I make a correction? The message he was asking about was a coded message from the Chase Manhattan Bank, and registered only the amount in the Mercantile National Bank, and nothing else.

Q. And the substance of the code—do you have the original coded message?

Mr. Cushman: Yes, I will give it to you.

Mr. Rassner: May I see it?

Mr. Cushman: Here it is.

Mr. Rassner: Do you have the night telegram of May 31st?

[8] Mr. Cushman: Here it is right here.

The Witness: This is not from the Chase Manhattan Bank.

Mr. Cushman: That is the letter.

Mr. Rassner: I object to counsel arguing with the witness.

Mr. Cushman: Here you are.

*By Mr. Rassner:*

Q. Is this the letter you have reference to, or the telegram? A. Yes.

Q. May I see that? A. Yes.

Q. Is this paper which I hold in my hand the paper you referred to as the coded message which you testified before trial on September 22, 1955, at the Biscayne Building?

* * *

[9] Q. I show you this paper and ask you if that is the telegram?

Mr. Cushman: What page are you referring to in the deposition?

Mr. Rassner: Page 34. Do you care to look at the deposition, Mr. Hudson?

The Witness: Yes. This is not the message referred to there.

Mr. Rassner: I ask you for the production of the message which is referred to.

Mr. Cushman: Give me the other one you have, counsel, and let me hand it to the witness.

Mr. Rassner: All right.

*By Mr. Rassner:*

Q. Is that the one you have reference to? A. It is.

Q. You say that that was a coded message in which the Chase Manhattan Bank had transferred to the account of the Mercantile Bank $228,570 for the account of Pierre Bourgeois?

* * *

[10] Q. May I have an answer to that; is it? Let me put this question to you then. I will withdraw that question. I put this question, and ask you if you so testified on Page

34 in your deposition on Thursday, September 22, 1955—starting with Page 33:

"Q. According to Defendant's Exhibit 14 (handing document to witness) were certain sums transferred to the account of the Mercantile National Bank? A. The First National City Bank of New York paid a certain amount of money, $228,570 to the account of the Chase Manhattan Bank, to the account of the Mercantile National Bank.

"Q. On what date was that? A. This is dated May 31st. If I remember correctly I think Chase received the money on June 1st if I am not mistaken in my dates. The message that Chase Manhattan sent to us is in code and the only thing that can be recognized between banks involved amounts like this as reliable."

Did you so testify? A. Yes.

Q. Was that true? A. Yes.

Q. I will go on:

[11] "Q. What coded message are you referring to? A. I am referring to the coded message where the Chase Manhattan Bank of New York advised us that our account had been credited $228,570 for the account of Pierre Bourgeois to be established with us."

Did you so testify? A. I did.

Q. Was that the truth? A. Yes, sir.

Q. Now, did you further testify as follows, and I am referring to the message on Page 34:

"Q. You say you saw it this morning? A. Yes."

I think perhaps in the interest of clarity I ought to read the introductory question on Page 33.

"Q. Do you know who would have the original of that coded message? A. It is in the file somewhere.

"Mr. Ehrich: Do you have that coded message (addressing Mr. Cushman and Mr. Horwitz)?

"Mr. Cushman: Never heard of it, don't know that it exists. I am surprised to hear what the witness said this morning.

"The Witness: I saw it this morning.

[12] "Mr. Cushman: I haven't seen it. I still haven't seen it.

"Q. You say you saw it this morning? A. Yes.

"The Witness: Do you have it (addressing Mr Horwitz)? You had it just a moment ago.

"Mr. Horowitz: Is this it (handing document to witness)?

"The Witness: No.

"We relied on the Chase Manhattan's cablegram. That is the only cabled message we have received in this connection that we could rely on because it was a coded message, a message that was used by banks where both banks have the code in their possession."

Do you recall that testimony given by you and the statements by Mr. Cushman that he never saw the coded message? A. I do.

Q. Where was that coded message at that time? A. I don't know.

Q. Do you know where it officially was after you saw it that morning? A. I think their accountant or somebody was confused on the message they were talking about. I am sure Mr. Ehrich was confused on the message he had in mind.

[13] Q. Do you know what Mr. Cushman meant when he said he never saw it? A. No.

Q. Was Mr. Cushman present when you saw it that morning before the testimony? A. No.

Q. Was Mr. Horwitz there? You addressed Mr. Horwitz and said he had it a moment ago. A. No. That message that I was talking about that morning they hadn't seen. It was not this message.

Q. Well, the message that you said, addressing Mr. Horwitz, you saw it this morning, what message were you talking about, when you said to Mr. Horwitz that you saw it that very morning? A. There was a message from, either directly or indirectly, either through First National City Bank of New York or Bank of Manhattan—Chase Manhattan Bank, recalling and cancelling a previous order of the Bank of France in regard to the transfer of this money.

Q. Was that the one Mr. Horowitz was referring to—the one he never saw? A. That's right.

Q. You were talking about the one you did see that morning. Was that not the one in which the funds had been [14] transferred to your account for Mr. Bourgeois? A. There are a number of messages, and these are not marked for identification. They must be identified by numbers.

Q. I am asking about one specific message—that one you told Mr. Horwitz you saw that very morning. Which one did you see that very morning? Was it not the one transferring the funds? A. I don't know what Mr. Horwitz saw that morning. I am only testifying to what I saw.

* * *

Q. Now, continuing on Page 34:

"Q. And as a result of that you testified that you were apprised that the Chase Manhattan had transferred to the account of Mercantile Bank $228,570 to the account of Pierre Bourgeois?"

On Page 36:

"The Witness: Yes. We received a message from the Chase Manhattan Bank of New York that the amount of $228,570 was credited to our account in New York.

"Q. And you previously testified for the account of [15] Pierre Bourgeois. We can have your previous answer read to you if you don't remember so testifying. A. Yes. It was in connection with this message (indicating)."

Did you so testify? A. I testified.
Q. Is that the truth? A. Yes.

Mr. Cushman: I suggest that counsel should read the balance of the witness's statements, he having been interrupted, which appears on the top of Page 37.

Mr. Rassner: Thank you. I choose not to act on your suggestion.

*By Mr. Rassner:*

Q. On Page 38:

"Q. What is the usual procedure on coded telegram received by a bank, are they translated and then the translation kept in the files together with the coded message? A. Yes."

* * *

[16] Q. I will continue:

"Q. What is the usual procedure on coded telegrams received by a bank; are they translated and then the translation kept in the files together with the coded message? A. Yes, unless there is reasons for removing them from the file.

Q. Then it is your testimony and you may correct me if I am making a mistake on your previous testimony that certain funds in the sum of $228,570 were transferred to the account of the Mercantile National Bank by the Chase Manhattan Bank— A. No.

"Q. Let me finish. (Continuing) —to be held for the account of Pierre Bourgeois, is that true or is that not true? A. They advised us that they had placed it to the credit of our account in New York at the instructions of the First National City Bank under the conditions as you will note in the message there (indicating) in Exhibit No. 14 which collapsed all of Mr. Bourgeois' representations and Mr. Rubenstein's representations to the effect that the Bank of France and the company did not wish a guarantee of this $228,570. It rendered everything that Mr. Bourgeois and Mr. Rubenstein had said of no [17] consequence."

Did you so testify? A. I did.

Q. Was it because of your feeling there were certain representations that had been made that had not been lived up to, that by reason of that you could cancel any previous arrangement and order the funds returned to Europe? A. The first original arrangement we had, that the company would either confirm or deny Mr. Bourgeois, and the first thing was the message of May 31st, direct to Mercantile by First National City Bank of New York wherein they told us that we were guaranteeing a note of Mr. Bourgeois' for $228,570, and we had never mentioned guaranteeing Mr. Bourgeois' note.

Mr. Bourgeois was told in the very beginning, from the first day that I met him, that the Mercantile National Bank was not disposed to guaranty anything for anyone.

Q. So, as a result of your conclusion—was it your own idea or somebody's else's? A. It was a notice from the company it was transferring the money; that they speci-

fically relied on the guaranty of the Mercantile National Bank upon the note of $228,000 signed by Mr. Bourgeois.

Q. Let me read this to you and ask you if this does [18] not refresh your recollection. Page 41:

"Q. Would you now answer the question, please? Did you or did you not rely on Mr. Bourgeois' representations and Mr. Rubenstein's representations or did you rely on your own judgment as a banker in these transactions? A. I only relied on Rubenstein and Bourgeois for the interpretation of the French terms with the full knowledge that my first statement to those men would have to be proven to be true and that is the only way in which they could be accommodated through the Mercantile National Bank.

"When you came into a bank you do business the bank's way. Now, this is the climax of it: When I found out that Mr. Bourgeois was not representing the facts as he said the company and the Bank of France understood them which is indicated right here (indicating) that they are expecting the bank to guarantee ~~which~~ I repeatedly told them we had not—

"Q. You stated in your answer to the last question that when a customer comes into a bank they have to do things the bank's way, is that correct? A. It has been an order it has to be done as the bank wants them in order for the bank to accommodate them."

Is that your testimony? A. It is.

Q. Is it true? [19] A. Yes.

Q. So that you were relying on your own judgment as a banker in going into the transaction, and not on what Mr. Rubenstein or Mr. Bourgeois told you; is that so? A. I told Mr. Rubenstein and Mr. Bourgeois, the first day I met them, that I did not believe what they proposed. I didn't thing it could possibly be true, but upon their insistence I said, "We will find out, but until such time as

we have sufficient and satisfactory acknowledgement from the principals in France involved, you will never get any money."

Q. And you said, did you not, on page 40:

"Q. And you stated that you would not rely on his representations but you would rely on your own judgment as a banker, is that correct? A. In the final analysis I must have that and it is what I held out for and what I got."

Did you so testify? A. Yes.

Q. Was it the truth? A. Yes.

Q. Then you proceeded to send certain communications to the French interests, did you not? A. There was a number of communications sent.

Mr. Rassner: Now, I understand the originals [20] are in the court file. May I have the court's indulgence for my associates to take them from the file?

The Court: Yes.

*By Mr. Rassner:*

Q. In any event, after a series of communications, Mr. Bourgeois came to you and asked you to send a certain wire containing some 10 words, did he not? A. Yes.

Mr. Rassner: If the court please, I understand that the original of that is in the original court's deposition. May we have it opened for that purpose?

The Court: The clerk may open it.

Mr. Cushman: If you will tell me what exactly you want—the ones that were marked for identification, we will be glad to give them to you. They were marked for identification. They are not attached to

the deposition when they are marked for identification. When they are offered in evidence, I understand they are.

Mr. Rassner: May I show this to counsel, your Honor, and maybe we can agree on it.

Mr. Cushman: This is all right.

Mr. Rassner: I offer this paper in evidence.

[21], Mr. Cushman: We object to it upon the grounds it is immaterial and irrelevant as far as the claim or cause of action in plaintiff's amended complaint, which is a complaint and action at law.

The Court: I will rule later on the objection. The document may be marked for identification as Plaintiff's Exhibit 1-B.

(The document referred to was thereupon marked, "Plaintiff's Exhibit 1-B.")

Mr. Rassner: May I read it to the Court.

The Court: Yes.

Mr. Rassner: "Banque Francaise du Commerce Exterieur, 21 Boulevard Haussman, Paris, France.

"Mercantile makes irrevocable agreement to reimburse draft $228,570 described our letters May 16 to you and Ciotat which constitutes our guarantee in full. Mercantile National Bank of Miami Beach."

*By Mr. Rassner:*

Q. Did you send the original of that? A. I did.

Q. Was there any qualification sent by you when you sent this message, Plaintiff's Exhibit 1-B for identification. A. The letter to the Bank of France under date of May 16th clearly and positively guarantees what I was guarantying [22] was a draft and not a note.

Q. Have you got copies of those letters with you? A. He had them a minute ago.

Q. Is this a copy of the letter? A. It is.

Mr. Rassner: I offer this letter in evidence. If the original is here, I will offer the original.

Mr. Cushman: Subject to the same objection, and that goes with the other one that you referred to first, Exhibit 1-A.

The Court: This document will be marked for identification as Plaintiff's Exhibit 1-C. I will rule later.

(The document referred to was thereupon marked "Plaintiff's Exhibit 1-C.")

Mr. Rassner: May I read the letter to the Court?

The Court: Yes.

Mr. Rassner: Copy of a letter from the Mercantile National Bank of Miami Beach, dated May 16, 1955: "Chantiers Navals De La Ciotat, 12 Boulevard de La Madeleine, Paris, France. Gentlemen: Our bank has accepted a note guaranteeing without reserve payment in the amount of $228,570, such executed by Client, Pierre Bourgeois, to the order of Chantiers Navals de La [23] Ciótat, payable on or before December 13, 1955.

"We shall hold it for your account and receive the payment thereon and guarantee that such monies will be forwarded to you and payable in U. S. funds, American dollars, by our check on a New York bank, New York, U. S. A.

"Upon receipt of this letter we shall beg you to kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach Florida, for the account of Pierre Bourgeois, as contracted. Very

truly yours, D. B. Hudson, Assistant Vice-President."

Did you write that letter?

The Witness: I did.

Mr. Rassner: May we substitute the one paper for the other?

The Witness: No; there are two different letters there.

Mr. Rassner: Oh, I see. Well, I would like to offer this then as an additional exhibit.

Mr. Cushman: That has been offered once.

Mr. Rassner: All right, Plaintiff's Exhibit 1-A, which reads as follows; and this is addressed to Banque Fransaise De Commerce Exterieur, 21 Boulevard Haussman, Paris, France. Gentlemen:

[24] "Our bank has accepted a note guaranteeing, without reserve payment in the amount of $228,570, such executed by Client Pierre Bourgeois, to the order of Chantiers Navals de La Ciotat, payable on or before December 13, 1955.

"We shall hold it for their account and receive the payment thereon and guarantee that such monies will be forwarded to them and payable in U. S. funds, American dollars, on New York bank, New York, U. S. A.

"Upon receipt of this letter, we shall beg that you kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach, Florida, for the account of Pierre Bourgeois, as contracted. Very truly yours, D. B. Hudson."

Is that correct?

The Witness: That is right.

*By Mr. Rassner:*

Q. Now, the cable which is Plaintiff's Exhibit 1-B, plus the letters, copies of which are marked Plaintiff's Exhibits 1-A and 1-C, constitute all of the communications which issued from you or your bank to the French entities; is that right? A. Those three there?

Q. Yes. A. No.

[25] Q. Were there any more? A. There was a number of them. I don't recall the number.

Q. I show you this paper dated May 27th and ask you if this is one? A. Yes.

* * *

Mr. Horwitz: This is a photostatic copy that was marked.

Mr. Rassner: All right.

*By Mr. Rassner:*

Q. I show you this paper—

Mr. Rassner: Is there any objection to my offering this in evidence without further questioning?

Mr. Cushman: No; subject to the same objection made to the others, that they are not material as far as the complaint in plaintiff's action at law is concerned.

The Court: There is no objection to the form?

Mr. Cushman: That is correct.

The Court: I will rule later. It will be marked [26] for identification as Plaintiff's Exhibit 1-D.

(The document referred to was thereupon marked, "Plaintiff's Exhibit 1-D.")

Mr. Rassner: With the Court's permission I will read it. Western Union International Communications, and some other things on it.

The Court: Just read the substance.

Mr. Rassner: "Via W. U. cables, FFR 1 PD Intl Fr Miami Beach, Fla." I think you can concede it was sent; is that right?

Mr. Cushman: No question about it.

Mr. Rassner: "Paris Branch, Chase Manhattan Bank of New York, Paris, France.

"Kindly advise Banque Francais Commerce Exterieur 21 Boulevard Haussman Paris that letters addressed May 16 to Bank & La Ciotat Paris, constitutes fullest reimbursement guarantee that an American bank can issue, as requested in their cable dated April 20, 1955 re La Ciotat Paris, Bourgeois New York & Miami Beach stop and consequently that we are looking for their immediate transfer of funds to Miami as requested stop we are advised further delay damaging the chartering situation advised ready long ago and trust immediate action will be taken by them stop we expect funds by telex. End. [27] Mercantile National Bank of Miami Beach, Florida."

Do you remember sending that cable?

The Witness: Yes.

Mr. Rassner: Do you have the 27th?

Mr. Cushman: Would you mind letting me have the exhibit when you get through, please, sir?

Mr. Rassner: Yes.

Mr. Cushman: Thank you.

Mr. Rassner: I offer this paper in evidence under the same conditions.

Mr. Cushman: Subject only to the same objection.

The Court: All right, I will rule later. It will be marked for identification as Plaintiff's Exhibit 1-E.

Mr. Rassner: I will read this one. Has it been marked yet?

(The document referred to was thereupon marked, "Plaintiff's Exhibit 1-E.")

Mr. Rassner: This one is dated May 27th, addressed to Chantiers Navals De La Ciotat, 12 Boulevard de la Madeleine, Paris, France.

"Mercantile prends engagement irrevocable rembourser traite 228,570 dollars au treize Decembre 1955 stop. Mercantile National Bank of Miami Beach."

[28] *By Mr. Rassner:*

Q. Did you send that wire? A. Yes.

Mr. Rassner: Well, I think we will agree between counsel later on the exact translation.

Mr. Cushman: I hope we can agree. I don't think there is any great difference of opinion on it, but I don't care to commit myself at this moment.

Mr. Rassner: We would like to call an interpreter if counsel cannot agree.

The Court: All right.

*By Mr. Rassner:*

Q. Now, the consideration of your entering into negotiations with Mr. Bourgeois, whether he be considered by you as a client or in the capacity as referred to him in your documents, was the idea that he would open an account in your bank?

The Witness: If Mr. Bourgeois proposed to open an account with the Mercantile National Bank because [29] the funds were being transferred if and when the obligations and agreements were determined between the bank and the Bank of France and the company. The determination was never made, Therefore the funds were never transferred.

*By Mr. Rassner:*

Q. Mr. Hudson, in the interest of saving time, so I do not have to go back to your deposition, is it fair to state that the substance of your testimony in your examination before trial was that you undertook to do this work without designating it as to what type of service it was, that Mr. Bourgeois would become a client of your bank? A. A transfer, if it were a transfer, an account would have been opened for him if and when the funds had been transferred to the Mercantile National Bank without any restrictions by the sender of the funds.

Q. That was the only consideration you were interested in? You were not to charge him any money; is that correct? A. That is correct.

Q. There was no agreement to pay you personally any money for any services? A. That is correct.

Q. And you acted only as a representative of the bank and for the bank in the scope of your position, and nothing personal? [30] A. The bank and I acted only as a transmittal agent in both receiving and returning the money.

Q. Irrespective of the manner in which you actually did act, the fact remains you had no personal interest in the matter? You were acting for and on behalf of the bank? A. My reason for entering it was for an acquaintance of mine and former friend who brought Mr. Bourgeois

in. I relied on Mr. Bourgeois and Mr. Rubenstein. They understood how they could satisfy the Bank of France and the French company.

Mr. Rassner: I move that be stricken as not responsive.

The Court: I will rule later on the motion.

Q. Perhaps I did not make myself clear. Whatever you did in sending any of these letters and handling any negotiations in relation to this money was done by you in your capacity, not as Mr. Hudson, but in your capacity as the bank; is that right? A. In my opinion—

Q. Is it right or wrong? A. Yes.

Mr. Rassner: That is all. May I reserve the right to put further questions to this witness later in the event it becomes necessary? I am finished for [31] the moment. I have no further questions.

Mr. Cushman: May I have the exhibits you have been using, please, sir?

Mr. Rassner: Yes.

*Cross-examination by Mr. Cushman:*

Q. Mr. Hudson, you said that the first occasion when you met Mr. Bourgeois was at Wolfie's Restaurant in Miami Beach; is that correct? A. That is correct.

Q. Tell the Court who was present besides you and Mr. Bourgeois at that time? A. An attorney by the name of Mr. Rubenstein.

Q. Albert Rubenstein? A. Yes.

Q. Had you met them there pursuant to a request on Mr. Rubenstein's part? A. I did.

Q. When you arrived there did Mr. Rubenstein state to you what he wanted to see you about? A. He did.

Q. And was Mr. Bourgeois present at the time Mr. Rubenstein stated the purpose of the meeting? A. He was.

[32] Q. What did Mr. Rubenstein say to you at that time with reference to the purpose of the meeting?

* * *

The Witness: He stated that they were trying to effect a transfer of funds from France from a shipbuilding company to Mr. Bourgeois, and in the course of the conversation he—I told Mr. Rubenstein and Mr. Bourgeois that it looked like someone was looking for a guarantee of an amount of money. They said no, that was not the purpose at all. The only thing they were looking for was an assurance that a note that Mr. Bourgeois would execute in favor of La Ciotat would be returned to France in U. S. dollars just as it was sent out, if and when Mr. Rubenstein repaid his note.

*By Mr. Cushman:*

Q. Who? A. Mr. Bourgeois. I am sorry—Mr. Bourgeois repaid the note. And that there was no obligation on the part of the bank at that time at all. Three or four times I refused to believe or go along with it or try to assist them. They were very insistent. I said, "Well, gentlemen. I don't believe your representations. I don't believe anyone would turn loose the [33] money. You may know what you have with your company. It is no concern of mine what you do. If they acknowledge to you they will make a free transfer to your account with no qualifications upon us, I will then help you in any way I can." And Mr. Bouregois and Mr. Rubenstein proposed they assist in the negotiations and the framing of the correspondence to the company, due to the difficulty in certain translations

with the currency exchange, and at that time I told them I didn't think they would receive any money in the first place. If and when, in the event any money was transferred, we would not release any money through the Mercantile Bank until such time as the company and both the Bank of France acknowledged to us under official guaranteed signatures that there would be no obligation on the part of the Mercantile National Bank in any way.

Q. Would you tell me, please, whether after that meeting in Wolfie's Restaurant you adjourned to the Mercantile National Bank? A. Yes; we did.

Q. Tell the Court, please, sir, whether Mr. Rubenstein and Mr. Bourgeois, or one or the other of them had any part in the framing or the composition of either one of those letters, Plaintiff's Exhibits 1-A or 1-C?

• • •

[34] The Witness: They did.

*By Mr. Cushman:*

Q. What conversation, if any, did you have with Mr. Rubenstein and Mr. Bourgeois about the contents of the letters, Plaintiff's Exhibits 1-A and 1-C, before they were written?

• • •

Q. Go ahead. Before the two letters did you have any conversation with Mr. Bourgeois and Mr. Rubenstein as to the contents of the letters? A. Yes.

Q. What was the conversation with reference to the contents of the letter you were to write?

• • •

The Witness: They wished and proposed to compose it because they said they understood what the French [35] departments and the companies wish, due to the difficulties of translation of certain language in that connection.

*By Mr. Cushman:*

Q. Did Mr. Rubenstein or Mr. Bourgeois make any statement to you as to what the substance of the communication should be?

* * *

The Witness: Yes; they did.

Q. What did they tell you about the form of the document that they wanted, and the purpose of the document—what was to be accomplished by it? A. We talked back and forth, and Mr. Bourgeois and [36] Mr. Rubenstein agreed that the first and last paragraph of this letter here, dated May 16th, marked Plaintiff's Exhibit 1-A, would serve their purpose.

Q. Which paragraph? A. First and third.

Q. All right, sir. What part did Mr. Rubenstein and Mr. Bourgeois take in the composition of that letter? What part of it represents their composition, if any? A. The first and third.

Q. The first and third paragraphs of both of those letters? A. Yes, sir.

Q. Exhibit 1-A and 1-C? A. That's right.

Q. Now, will you please tell the Court whether at that time you had any discussion about the question of whether or not any guarantee was required of the bank to pay any obligation of Pierre Bourgeois?

* * *

[37] *By Mr. Cushman:*

Q. Now, the question was, was there any conversation at that time as to whether any guarantee of any obligation of Pierre Bourgeois was expected or required? A. There was.

Q. State what was expected in that connection.

• • •

Q. Go ahead. A. It was well understood—

Q. What was said is my question, please sir. A. There was to be no guarantee on the part of the Mercantile National Bank with respect of anything with the exception of returning the funds to France if and when we received it from Mr. Bourgeois, in American dollars, and there was to be no guarantee of any objection on the part of Mr. Bourgeois, and I so stated to the Bank of France in the second paragraph of my [38] letter.—

Q. Did Mr. Bourgeois make any statement to you as to whether or not the shipbuilding concern or the Bank of France expected any kind of guarantee of his obligation? A. They both said positively that the Bank of France and the company did not expect or want any guarantee from anyone.

Q. All right, sir. Now, then, tell the Court, if you will, please, sir, whether this telegram dated May 27, 1955, Plaintiff's Exhibit 1-E, was written by you entirely? A. No; it was not.

Q. Well, it is in French, I observe. A. Yes

Q. Where did you get the French? A. It was provided by Mr. Rubenstein and Mr. Bourgeois.

Q. Would you tell the Court, please, sir, whether you yourself either write or read French or speak French? A. I do not.

Q. Would you tell the Court, please, sir, whether Mr. Bourgeois and Mr. Rubenstein furnished you with the text to be sent, and which was sent, in the telegram, Exhibit 1-E? A. Yes.

Q. Would you tell the Court whether Mr. Bourgeois or Mr. Rubenstein at the time that telegram, Exhibit 1-E, was sent, made any statement to you as to what its contents

stated as far as [39] any assurance to the bank was concerned? Did they make any statement to you about that? A. Yes.

Q. What did they tell you that represented, or what did they tell you as to whether it constituted an assurance? A. That the French word traite means draft, and draft referred to, as in my letter of May 16th, which we would issue when and if the money was transferred to us in payment of his note.

Q. Did Mr. Bourgeois or Mr. Rubenstein at that time tell you that this telegram, Exhibit 1-E, constituted an agreement or understanding on the part of the Mercantile National Bank to agree to pay the note of Pierre Bourgeois in the event he defaulted or failed to pay it on December 13, 1955?

* * *

[40] *By Mr. Cushman:*

Q. Is that what they told you at the time they told you to end the telegram, Exhibit 1-E? A. They did. My understanding of the word traite was and is now, that traite and draft mean the same thing.

Q. Now, then, this telegram, Plaintiff's Exhibit 1-B, is that also a telegram that you sent at the request of Mr. Bourgeois? A. I did.

Q. Now, will you tell the Court, please, sir, whether the letters of May 16th, which are referred to in the telegram, Exhibit 1-B, are the same letters which have been marked for identification as Plaintiff's Exhiibt 1-A and 1-C in this case? A. They are.

Q. Tell the Court, please, sir, whether this is a cablegram or telegram that was received in connection with the transmission of the sum of $228,570 which was referred to in the previous Exhibits 1-A and 1-C, and succeeding telegrams? A. It is.

[41] Mr. Cushman: We realize this is out of order a little bit, but we offer it in evidence, if you have no objection to our offering it out of turn.

Mr. Rassner: May I have a moment, your Honor?

The Court: Yes.

Mr. Rassner: We consent to this going in evidence.

The Court: It will be received and filed in evidence as D-1; D standing for defendant's.

(The document referred to was thereupon marked, "Defendant's Exhibit D-1.")

Mr. Rassner: If the Court please, some of this is in French, and if we do not agree on the meaning it may be necessary—

The Court: It may be interpreted later if there is any dispute as to the translation.

Mr. Rassner: Yes; but we do not object to it in its original form.

Mr. Cushman: We offer a translation of this telegram which has heretofore been referred to was Plaintiff's Exhibit 14.

Mr. Rassner: This is a correct translation.

The Court: The translation will be appended to Defendant's Exhibit D-1 and will be marked D-1-A, and received in evidence.

[42] (The document referred to was thereupon marked, "Defendant's Exhibit D-1-A.")

*By Mr. Cushman:*

Q. Would you tell me, please, sir, whether the telegram I hand you is the telegram advising of the transmission of the funds? A. It is.

Mr. Cushman: We offer that in evidence, if you have no objection, out of turn.

Mr. Rassner: This is consented to, your Honor.

The Court: It will be received and filed in evidence as Defendant's Exhibit 2, and marked D-2.

(The document referred to was thereupon marked, "Defendant's Exhibit D-2.")

Q. Now, would you tell me, please, sir, whether after the receipt of the telegram which has been received as Defendant's Exhibit D-1, which referred to the transmission of the funds, and the translation, would you tell me please, sir, whether you had occasion to attend a conference between Mr. Rubenstein, Mr. Bourgeois and Mr. Alvin Cassell in the office of Broad & Cassell? A. Yes; I did.

Q. Tell the Court whether that conference referred to the $228,570 and the release thereof to Mr. Bourgeois? A. It did.

[43] Q. Were you present during the entire conference? A. Yes; I was.

• • •

Q. All right, sir. State what Mr. Rubenstein said with reference to the purpose of the meeting, please, sir. A. Well, there was the fact of succeeding in getting the bank to release the $228,000 which was in the New York account to Mr. Bourgeois' account, which I had already firmly and positively declined to make.

[44] Q. What do you mean, declined to make—declined to disburse? A. That is right.

Q. Tell the Court whether you had before you, and whether there was present at that time in that conference, the telegram which has been received as Defendant's Exhibit D-1 and the translation, D-1-A?

• • •

The Witness: Yes.

Q. Those telegrams, you say, were before you and were they discussed at that time? A. They were.

Q. Would you tell the Court, please, what was said concerning those two telegrams—rather that telegram, D-1 and the translation, D-1-A?

* * *

Q. What was said concerning that telegram, D-1 and the translation, D-1-A? [45] A. In effect, Mr. Rubenstein and Mr. Bourgeois were attempting to also convince Mr. Cassell that there was no guarantee on the part of the Mercantile National Bank for Mr. Bourgeois' note in the amount of $228,000, which we were holding for the account of La Ciotat.

Q. Did Mr. Cassell at that time state to Mr. Bourgeois and Mr. Rubenstein, that as he read the telegram, D-1, and the translation, D-1-A, that it obligated the Mercantile National Bank to guarantee to pay the note at maturity if Mr. Bourgeois failed to pay it? A. He did.

Q. Tell the Court whether Mr. Bourgeois or Mr. Rubenstein stated any different connotation or any different representation, with reference to the text of the telegram? A. They contended we misunderstood the text and meaning of the message.

Q. What did they tell you was the correct meaning of the message, D-1 and D-1-A? A. I don't recall the complete details of it, but they still said the Mercantile National Bank would not be involved in any way, or we were not guaranteeing or lending or giving credit to Bourgeois.

Q. At that time would you tell the Court, please, whether Mr. Cassell had anything else to say about what should [46] be done as a result of the receipt of this telegram, D-1 and the translation, D-1-A? A. Yes. He confirmed my action in not releasing any money on the message, and the fact they would have to be, as I originally requested and told

both Rubenstein and Bourgeois—there would have to be a complete and correct and perfect confirmation from the company and the bank that there was not any obligation on the part of Mercantile National Bank.

Q. Obligation to do what? A. To guarantee payment of Bourgeois' note at the time it became due, December 13, 1955.

Q. When Mr. Cassell told Mr. Rubenstein and Mr. Bourgeois there would have to be a confirmation there was no obligation on Mercantile National Bank to pay the note Mr. Bourgeois made, did he state to Mr. Rubenstein and Mr. Bourgeois what they should do? A. They should either get a cable off or telephone call to the company and the bank and have them furnish us with that confirmation.

Q. What did Mr. Bourgeois and Mr. Rubenstein, or either of them say about that? A. I don't recall their exact answer, but there was no effort made in that direction.

Q. Did they say they would get it or would not get [47] it, or what did they say, if anything?

* * *

*Redirect examination by Mr. Rassner:*

Q. After that money was credited by the New York bank to your bank did you send any further written communications or cables to anyone with reference to that money? A. I did not.

Q. Did the bank? A. I believe Mr. Adelson sent them a cable advising them that the terms of our proposal had been misunderstood, and therefore we could not continue in the case, and were withdrawing and awaiting their specific advice.

Q. That was about 27 days after the money had been credited to your account? A. It was not.

Q. When was that? A. That was on June 2nd or 3rd. I am not sure whether it was the 2nd or 3rd of June.

Mr. Cushman: Let the record show I have passed counsel Defendant's Exhibit 15 for identification.

[48] The Court: That is 15 in the deposition?

Mr. Cushman: Correct, sir.

The Court: In the deposition of this witness?

Mr. Cushman: That is correct, sir.

Mr. Rassner: With the Court's permission, may I address Mr. Cushman?

The Court: Yes.

Mr. Rassner: If you will offer this as your exhibit, Mr. Cushman, I will not object to it. I do not want to offer it as a plaintiff's exhibit.

Mr. Cushman: We are willing to offer it as a defendant's exhibit.

The Court: Received in evidence and filed as Defendant's Exhibit 3, marked D-3.

(The document referred to was thereupon marked, "Defendant's Exhibit D-3.")

Mr. Rassner: May I read it to the Court?

The Court: Yes.

Mr. Rassner: "Intl Fr Fax Miami Beach June 3. Banque Fransaise Du Commerce Exterieur, 21 Boulevard Haussman, Paris, France.

"Re 228,570 Bourgeois—Ciotat: Transfer having not been made as demanded and expected we are compelled to withdraw. We await instructions. Mercantile [49] National Bank of Miami Beach."

*By Mr. Rassner:*

Q. That is the paper you have reference to; is it not? A. Yes.

Q. Now, that was the first communication sent by your bank with relation to these funds after the money had been

credited to your account for the account of Pierre Bourgeois? A. Yes; after the receipt of the telegram confirming it from Ciotat and the Bank of France.

Q. When that money was transferred off the books of the New York bank that became your money? A. No.

Mr. Cushman: I object to that. That is a question of law.

Q. In any event, was it your bank who, on or about the 27th of June, 1955, requested the recall of this money back to Europe? A. I beg your pardon.

Mr. Rassner: Read the question.

(The pending question was thereupon read by the reporter as recorded above.)

The Witness: Mr. Adelson received some kind of communication through New York channels that the money [50] would be replaced or blocked in a restrained account or special account in either the Chase Manhattan or National City bank, or wherever the money might have been at that time.

Mr. Rassner: At this time I would like to call the Court's attention and put into evidence an exhibit attached to the defendant's answers to interrogatories, which is marked Exhibit A, and reads as follows:

"June 27, 1955. The Chase Manhattan Bank, 18 Pine Street, New York, N. Y. Attention: Mr. W. C. Rowe, Assistant Treasurer. Gentlemen:

"This will confirm our code telegram today requesting that you return to the First National City Bank, New York, the sum of $228,570 which you advised in your telegram of June 1 was being credited

to our account by order of Banque Francaise Du Commerce Exterieur, Paris, France, deposited by the First National City Bank, New York. Very truly yours, Louis C. Adelson, Executive Vice President."

May I have that cablegram, Mr. Cushman?

The Court: Since it has been read into the record can you not stipulate that such a communication was sent and received by the addressee?

Mr. Rassner: Plaintiff is willing to do so. [51] Are you, Mr. Cushman?

Mr. Cushman: We are willing to agree that a telegram, the substance of which is stated in the letter which has been read, was sent.

*By Mr. Rassner:*

Q. Mr. Hudson, I think you testified you have been a banker some 18 years; is that so? A. Yes.

Mr. Rassner: No further questions.

Mr. Cushman: No further questions of the witness.

*By the Court:*

Q. Before this initial conference at Wolfie's, as I understand it, you did not know Mr. Bourgeois? A. Never heard of him before 2:30 or 2:40 of the afternoon of May 16th. The first time I heard his name was when Mr. Rubenstein called me by telephone.

Q. You did not know him personally or by representation? A. No, sir.

Q. Were you apprised of the business or occupation or profession of Mr. Bourgeois? A. They first stated their purpose in asking me to assist them, and I told him I

didn't think I could do it. Mr. Rubenstein, I told him I didn't think I could help him. He said he wanted to come over to see me anyway. I said, "It is too late [52] today. I am going to lunch in a few minutes," and he proposed they meet me for lunch at Wolfie's, if I was inclined to help him.

Q. Never mind that. That was May 16th of this year? A. That's right.

The Court: That is all. Next witness.

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Thereupon PIERRE BOURGEOIS, the plaintiff herein, was called as a witness on his own behalf, and having been first duly sworn, was examined and testified as follows:

*Direct examination by Mr. Rassner:*

Q. Mr. Bourgeois, how old are you?

Mr. Cushman: May I make a request that may it be understood that it shall not be necessary to make any objection to relevancy, materiality or competency or form of the question?

The Court: Well, I would suggest that you reserve the right, with the Court's approval, and the consent of counsel for the plaintiff, to move to strike later any testimony deemed immaterial and irrelevant or incompetent.

Mr. Cushman: I will so stipulate.

Mr. Rassner: So will the plaintiff.

[53] The Court: I am anxious that all the facts be developed and I will try to separate the wheat from the chaff later. Should the striking of some such testimony prejudice either side, and there could be

substituted for it competent testimony, I will take care of that situation as well when the time comes.

Mr. Rassner: We are perfectly willing to stipulate to that.

*By the Court:*

Q. I would like to have the witness please state for the record his name, and his address, both residence and business. A. Pierre Bourgeois, 3925 Collins Avenue, Miami Beach.

Mr. Rassner: If the Court please, in view of the procedure that we are following, which is perfectly satisfactory to the plaintiff, may we ask that we have the question of liability submitted to the Court first, and then should the Court find there is liability, that we then go into the question of damages?

The Court: I want to close all the evidence as quickly as possible. I want in all the evidence on which both sides agree, and then the case will be decided. I do not want to have two hearings and two [54] decisions.

Mr. Rassner: Whatever the Court sees fit is perfectly agreeable.

*By Mr. Rassner:*

Q. What country are you a citizen of? A. United States of America.

Q. And where do you live? A. I live in Florida.

Q. How long have you lived in the State of Florida? A. For a number of years.

Q. Approximately when did you first come to the State of Florida? A. I guess it was five or six years ago.

Q. What has been your educational background? Where were you educated? A. I was educated in Paris, France. I had two degrees, Doctor of Economic Science, and Doctor of Civil Law.

Q. In what business have you been engaged, let us say since 1940 or 1941. A. Well, that was at the time of the war.

Q. Yes; right from when the war broke out up to now. A. At the time that war broke out I was general export manager of a French company manufacturing chemicals and manufacturing aluminum. I was one of the representatives of the [55] French group in an aluminum cartel. Then I became an officer in the French army, on September 5th, I think, 1939. And after a few months I was on special service to the Ministry of Armament. In view of the fact I had particular knowledge of international matters, I was sent to Holland for the purpose of buying for the account of the French government, machinery that they needed in Germany, and I spent the time necessary to get my machinery inside the border of France before the Germans started to move.

Then, at the time when the armistice was signed I gave my resignation to the company, and I decided to join the DeGaulle government in England. However, because of my young age I could not leave immediately, and I had to wait about one year, let us say, to get my papers for my family, and we moved down to Portugal.

In Portugal I registered with the British Embassy and DeGaulle ambassador, and I stayed there for a number of years, helping the delegates of DeGaulle in that particular country who were sitting inside the British embassy. I did not receive any salary. I paid all my expenses myself, and I was referred to be Minister of Finance and Commerce in the DeGaulle government of 1943, I think, which did not come because I came to the United States.

At the end of the war I received a Portugese decoration [56] of the Red Cross for certain services that I have given to the French and British and Americans and to the Jewish colonies there. Then I went to this country, and before coming to this country I stayed in Portugal for an additional month, although I had all my papers in order, because I was offered a certain exportation from Switzerland, where I have many acquaintances, and where I have offices, at that time and in previous years, to sell and buying for myself and reselling it, the production of two watchmakers. And I came here in 1946 and I decided I would be engaged in the American trade with which I was familiar, since I had sold metals, particularly non-ferrous metals all over the world before the war.

Q. Name some of the countries in which you worked in non-ferrous metals during and after the war, up to the present time. A. During the war I made no business whatsoever. As I told you, I joined the DeGaulle government, and let us say I was a special attache to the French DeGaullists in Portugal, and I did not engage in any business activities.

Q. When did you start engaging in the handling of non-ferrous metals? A. I was in that before the war, and when I was here a few months, let us say in 1946 and 1947.

Q. Quite specifically, I am concerned with tankers. [57] When did you first decide to do that kind of work? A. I was suggesting the release of certain technical features to this country from the old country to the Navy Department, and because of my connections outside, to try to build for chartering individually oil companies, tankers of a new speed—high speed, and also with a good ratio of cargo so there would be a good rental. That was in the very first months of 1953. Also, I had been interested before the war.

Q. You had had experience before the war? A. Yes.

Q. I want to get down to 1953. In 1953 you were already an experienced operator and handler of vessels, including tankers? A. Yes.

Q. In 1953, can you tell us what months you first interested yourself again in connection with merchant tankers or vessels? A. I think it was in the month of April.

Q. What countries did you visit in connection with your business of handling tankers or in the building of tankers? A. I should say I have a perfect kno vledge of the tanker building situation in France, Holland, England, Norway and Sweden. I know their yards. I have visited the most important [58] of them, and I know at which price each of them can build, and the type of qualities each of them can reach.

Q. Which shipyards did you negotiate with and have conferences with before you came here? Give it to us by country; the country first and the shipyard next. A. Well, I would mention Italy, and I would mention Finmecca Nica, which is a holding company, which is owned by the Italian Government, and Ansaldo Company in Genoa, and Cantieri Reuniti Dei Adriatico, in Trieste. Both of them have sufficient ways. Both have sufficient size of ways which I was interested in.

Q. What was the gross tons or size you were interested in? A. 36,000 tons. The depth is 75 in my particular case and displacement I think should be 16,000.

Q. And cargo capacity? A. Well, that is approximately—my original drawings were for 30,000 net.

Q. 30,000 tons? A. Yes; and also I am not an engineer, and since because I know all the engineers in all the shipyards, I learned from them a great deal, and I was able to give at that time ideas to all the engineers so that the net that could be transported, and this is very important, and they could increase the net to [59] around 32,000 tons. You see that with a dead weight of 36,000 tons I am able to

move 32,000 tons, and Mr. Narassis with 42,000 tons is only able to move about 37,000 tons, and you compare the two types of ships and you see what a difference it is and why the type of ships which I am interested in are very much better and very much easier to be financed and very much more rentable on a long term basis and with a very much better end value to the end of the period of amortization.

Q. You are talking of the chartering rental value? A. Yes.

Q. The speed of these contemplated vessels which you were interested in building—

* * *

*By Mr. Rassner:*

Q. You were naming the different shipyards when I [60] interrupted you. Please continue naming the shipyards.

* * *

The Witness: In Italy there is another one, Confrere Cantieri Taltrao. This company is not suitable for that type of ship because their ways can only permit the building of a ship to approximately 20,000 to 22,000 tons.

*By Mr. Rassner:*

Q. Now, this vessel was paid for by your own funds? A. Yes.

Q. In the name of the other shipyards? A. No. Let us take Germany. I know shipyards there, Olswecker in Hamburg, not to be confused with Olswecker in Keil of the same name, but the same company does not own both of them, and they manufacture these large ships—

Q. How many shipyards were there in Germany that you visited? I just want to know how many you visited.

A. These two in Germany. I did not enter into negotiations with anyone in Germany.

Q. Then let us go to the next country. A. There is in Holland where I discovered that one shipyard is capable to build that type of vessel. The name is much more difficult to translate it into English. I volunteer [61] to give you the name a little later. That is a very long name.

Q. Well, is it called Skibs? A. Yes.

Q. That is the largest one there? A. That has become the largest one. They just started building a new way for building 60,000 ton ships. They were thinking the Dutch government would give them a subsidy to build a new—

Q. Now, Pierre, let me interrupt you now and ask you how many shipyards did you visit in Holland? A. Three—this one and two others which were smaller.

Q. Without going into details now, I just want to get the number you visited. There were three in Holland, and what other country did you go to before you went to France? A. I went to England. In England—I know England for 35 years and—

Q. Please answer my question. In England, how many shipyards did you visit? A. One in Liverpool and two in Glasgow.

Q. What other country before France? A. Before France I was in negotiation with Sweden and Norway.

Q. How many shipyards in Sweden? A. Two in Sweden.

[62] Q. How many in Norway? A. One.

Q. How many other countries besides France? A. None.

Q. In France how many did you negotiate with before—A. Two.

Q. Before you went in with Ciotat? A. Number 2, but the Number 2 has been produced by the Number 1, which is La Ciotat.

Q. Now, La Ciotat is this company which was sending you the money? A. That is right.

Q. Now, would you tell his Honor the date when you first started to negotiate with La Ciotat? A. I started to negotiate, if I remember correctly, on the 23rd of November, 1954, at 8:30 in the evening.

Mr. Rassner: If counsel has no objection to a few leading questions?

Mr. Cushman: No.

Q. With reference to building ships; is that what it was? A. That is right.

Q. The negotiations were for the purpose of building ships? [63] A. That is correct.

Q. And you were to build the ships? A. That is correct.

Q. And they were to build them for you? A. That is right.

Q. And you wanted them to finance the building of the ships? A. No; I advised them that—

Q. You go ahead from there. The negotiations were for the purpose of them building ships for you? A. That is correct.

Q. And you were to come to this country and obtain charter hire for these ships? A. That is right.

Q. Would you explain the details to his Honor? A. I was approached by the French, because of the circumstances, on the 23rd of November, 1954, and they begged me not to deal with Germany, which I intended to.

Q. Up to that time you had paid all these expenses yourself in all these countries and all these negotiations? A. Yes.

Q. Approximately how much money had you spent? Approximately how much money did all these deals and negotiations cost? [64] A. The exact figure is only to be given this way; is it between $600,000 and $1,000,000.

Q. That was your money? A. Yes.

Q. Then you started your negotiations with the French company? A. That is right; at their request.

Q. Go ahead. A. They said, "Mr. Bourgeois, you are a Frenchman. Why should you deal with the German? Anything the German can do, we can do." I said, "All right, let us see what you can do."

Q. And then? A. Then the president, Jean-Mari Terrin, he is chairman of the Board of Directors of Chantiers Navals De La Ciotat. He resides permanently near Marseilles, and—

Q. When and where did you have a conference with him? A. In Paris. If I had been contacted on the 23rd, I should have come two days later. That should have been on the 25th of November. It was he who visited me in my hotel room in Paris.

Q. That was 1954? A. Yes.

Q. Go ahead. [65] A. So, I advised him of, if he had an interest, what did he have to offer, and I told him I had just signed with the German this contract. Now, I wanted my German contract with some modification because in the meantime I had learned something, and I wanted to improve certain conditions in my contract, being about 30 per cent better than the standard contract, so they accepted. And then he told me, "I wish you to meet my friend—he was the president of another shipyard by the name of"—

Q. Never mind that. A. There was another one which has merged since then with another one in the same neighborhood, Mr. Pinson becoming the chairman and president of the new concern.

Q. Did you meet with him? A. Yes; he came in my hotel room.

Q. After your discussion with them did you enter into an agreement? A. Refused to enter.

Q. Did you later enter into an agreement? A. Refused to enter any agreement with Mr. Pinson. I accepted to enter an agreement with Mr. Terrin.

Q. Did you later enter into an agreement wherein you arranged to get them a subsidy from the French government? A. Oh, yes.

[66] Q. Tell us about that. A. We discussed two matters. No. 1, the terms of the contract. No. 2, the type of price. You understand that vessels of 21 knots at 36,000 tons are extremely expensive.

Q. How much for each vessel? A. Well, I have contracted for a price—the price is different on three.

Q. Name all three. Give it to us approximately. A. There was a difference of approximately $50,000 between the No. 1 and No. 2, and $100,000 between No. 2 and No. 3.

Q. What is the approximate price? A. Approximately $8,000,000.

Q. Did you arrange for a subsidy by the French government for your work? A. Yes.

Q. Tell us about the subsidy. A. That is actually of an actual building price; the actual cost of the machinery they have to buy of approximately $11,000,000, so that the subsidy is—

Q. That is each vessel? A. Each vessel, so a subsidy of about $3,000,000 was necessary.

Q. On each vessel? A. Yes.

[67] Q. On how many vessels did you arrange a subsidy? A. Three.

Q. On how much was each vessel? A. $3,000,000.

Q. Was that subsidy agreed upon in writing from the Government of France with the shipbuilding company? A. Yes; and it was a result of my work, in great part, and as a result of my contracting the ships, and the result of the company itself.

Q. And did you enter into a written contract with this French shipbuilding company for them to build vessels for you? A. And it started with a one-page agreement on the price, which is in the amount of $6,900,000. The difference between the $6,900,000 and the $8,000,000 is represented by the cost of intermedial interest, which has to be paid between the time the money for the vessel is proved and the time when the vessel is built, because the company cannot finance the cost of the veseel which is finished, but deposited in the Bank of France was certain moneys that they do not permit a foreign bank to get intermedial finances.

Q. In any event, you closed a contract with Ciotat? A. That is right.

Q. To build ships for you? [68] A. That is right.

Q. How many ships? A. Three, at $6,900,000, signed November 7, 1954.

Q. As part of that agreement did they agree to give you an advance of a certain sum of money? A. It is not an advance of money.

Q. Did they agree to give you certain funds? A. That is right.

Q. How much did they agree to give you? A. $900,000, in order to repay part of my expenses and permit me to put a guarantee with a chartering company.

Q. You agreed to come to the United States and get charters from various oil companies? A. Yes.

Q. You agreed to do it? A. Yes.

Q. And you did come to the United States for that purpose? A. Well, I was—I came back and—

Q. Did you start negotiating for these charter parties? A. Yes.

Q. Did you enter into an agreement for these charter parties? A. I gave my agreement.

[69] Q. How many agreements for charter parties did you obtain? A. Well, in the year 1955, on five ships.

Q. Now, would you have any objection to giving us the names of the companies, or is it confidential? A. Well, it is confidential.

Mr. Rassner: Would your Honor have any objections if we supplied those names in confidence to the Court?

The Court: I do not want any confidential information that is not in the record.

Mr. Rassner: It is only a question of a business relationship, and he would rather not divulge his source.

The Court: I want the Supreme Court to know whatever I know in the event this is appealed.

Mr. Rassner: Off the record.

(Informal discussion off the record.)

Mr. Cushman: Let us put it on the record.

Mr. Rassner: Do you think if I ask it off the record, and then if you want it on the record, we will put it on the record.

The Court: If it is intended to influence the Court in any respect, I will not agree to it.

Mr. Rassner: May we have a minute's recess, your Honor?

[70] The Court: Yes.

(Thereupon a short recess was taken, after which the following proceedings were had:)

*By Mr. Rassner:*

Q. Continue, please, Mr. Bourgeois. Will you give me the names of five companies with whom you have started negotiations for the charter of these vessels which are to be built for you? A. From these five companies which I will name, and which is—

Q. Do not go into details. Just name them. A. Standard, Shell, Sinclair, Gulf and Socony-Vacuum.

Q. Now, in connection with your work in the building of the ships, as well as in the chartering of vessels and your charter parties, was there an arrangement whereby a certain sum of money was to be forwarded to you? A. Yes.

Q. How much? A. Well, originally it was—

Q. No; this last amount. A. $228,570.

Q. Was that money sent to you?

* * *

[71] *By Mr. Rassner:*

Q. By whom was it sent? Who sent the money? A. Well—.

Q. What company? A. Who ordered it or who sent?

Q. Whose money was it? Let us start with that? A. I had money due to me by the contract.

Q. That was your money, due you? A. Yes.

Q. Who was supposed to send it from France? A. La Ciotat Company.

Q. Were there any French regulations preventing the transfer of money without assurance of its return? A. That is a basic regulation of the Bank of France.

Q. In order to get that, did you go to Mr. Rubenstein and engage him as your lawyer? A. Yes.

Q. Did he tell you that was a banking proposition? A. He told me; yes.

Q. Did he take you to Mr. Hudson? A. He so did.

Q. When? [72] A. On the 16th of May, 1955, at 2:40, at Darby's on Lincoln Road.

Q. Is that the same Mr. Hudson who testified a short while ago? A. Yes.

Q. Is that the man you spoke to? A. Yes.

Q. Where did you first meet him? A. I do not know whether we went up to the bank and took him down to the restaurant, or whether we met him in the restaurant. I went to Mr. Hudson and was introduced to Mr. Hudson, and we decided to have lunch at Darby's.

Q. In any event, you were at Darby's? A. Yes.

Q. Did you have a conversation with reference to your money that you wanted? A. I had Mr. Rubenstein to help in the matter, but he said he was not able to give advice as it was a banking proposition, but Mr. Hudson was introduced to me by Mr. Rubenstein.

Q. I am only interested in your conversation with Mr. Hudson. A. I advised Mr. Hudson there are certain funds in France, and I had signed an agreement on the 12th of November—

[73] Q. Explain to the Judge everything from there on, without going into all the little details. A. I presented and said in a few words the matter that I have to receive a certain amount of money which is $228,570, for which I have to give a receipt under the form of a note, this note being withdrawn on account as per the agreement that you see here, and in order to meet the regulation of the Bank of France it has to receive an aval from the bank.

Q. What is an aval? A. That is a special French word which is not a guarantee, which indicates that the person for whom or which you express an aval will actually do so at the time when he has to do so.

Q. Did you explain that to Mr. Hudson? A. We did not come into that many details. He simply said he wants to receive something in the name of the bank advising the thing could be so.

Q. After that conversation did Mr. Hudson, in the name of the bank, send a number of letters which were rejected as unacceptable by your people? A. He sent two letters.

Q. Those letters were rejected by your people in France as not acceptable?

Mr. Cushman: This is something that could very [74] well be important and something which I do not know, and I object.

Mr. Rassner: I will withdraw it.

*By Mr. Rassner:*

Q. After your conversation with Mr. Hudson he wrote certain letters, did he not? A. Yes; these two letters.

Mr. Cushman: Plaintiff's Exhibits 1-A and 1-C.

Q. After he wrote the first letter were the funds sent; yes or no? A. No.

Q. After he wrote the second letter were the funds sent; yes or no? A. No.

Q. Then, after these two letters were sent and the funds were not sent, you had another meeting with Mr. Hudson? A. That is right; at Wolfie's, on the 23rd of May, 1955, at about 9 o'clock, and then we went to the bank and I advised Mr. Hudson that the letter apparently had been considered so far unsatisfactory, and since I am not a banker and I did not understand anything about it, I said, "Mr. Hudson, you are my agent. I want you to help me. What should we send?" So, he had certain ideas. He said—

Q. In any event, Mr. Hudson refused to advise you [75] and he told you to find out what they wanted; is that right? A. No. After I made a suggestion which was not retained, and he said it was no good, I composed the text of the telegram of May 23, 1955. The only thing was, instead of sending it direct to the French bank, since they were

connected with the Chase Bank, they sent that cable to the branch in Paris of the Chase Bank.

Q. I show you this— A. That is not the one. I think it is this one, the white one.

Q. Exhibit 1-D? A. Yes.

Q. Will you explain the circumstances under which the telegram, 1-D, was sent? A. As I mentioned before, the funds were not sent, and I was advised that the French side wanted some clarification.

Q. Did you communicate with the French by telephone? A. I was called by them several times.

Q. You had several conversations with whom in France? A. Well, I was told—I am regularly called through my agent, Henry Renaux; the president of the corporation, Mr. Jean-Mari Terrin, and the financial man, let us say, of the staff, who is—

Q. Without going into any details of the conversations, all those conversations were for the purpose of obtaining [76] satisfactory communications so the money could be sent? A. Yes.

Q. That was the purpose of these conversations? A. Yes.

Q. After these conversations was this 1-D composed? A. Yes.

Q. Who composed 1-D? A. Mr. Hudson. My text was rejected.

Q. In any event, that was his text? A. Yes.

Q. And it was sent? A. Yes.

Q. As a result, after that text was sent, did you receive a communication? A. Yes.

Q. What was the substance of your communication? Is it here? A. No. Three cables were received on the 26th of May. Two were received by myself in Daytona Beach where I was on that date with Mr. Ehrich and Mr. Rubenstein. One was received at the bank, which the original Mr. Hudson has refused to produce.

Q. There were several further conferences in order to straighten out the situation? A. One.

[77] Q. After that did you make a request that a certain group of words of about ten words to be sent to France? A. As I said and mentioned, I received two cables—identical cables; one from the agent; one from the bank, asking, if the bank is agreeable, let her send 10 French words—the ones you have here, and—

Q. Just a minute. Let us not go into the details. I just want the meat of it. A. Which ten words the French bank want sent before they send the money

Q. Is this the text of what the French wanted? A. Exactly the text.

Q. Is it the French bank that wanted the text? A. Yes.

The Court: Identify it, please.

Mr. Rassner: Exhibit 1-E.

Q. Tell us what you did with the text? How did that come into existence? A. I came to the desk of Mr. Hudson, and it was around 10:20, and he asked me was the news well from France, and I told him here are the two cables that I have received.

Q. As a result of that conversation did Mr. Hudson send 1-E? A. That is correct; it is.

[78] Q. He did send that? A. That is correct. He told me; "Is that what they want?" I told him, "Apparently they do." So he took the telephone and Mr. Hudson called from his desk Mr. Dismukes.

Q. Who is Mr. Dismukes?

Mr. Cushman: Professor of languages, University of Miami.

The Witness: Yes; who gave the translation and confirmed it by letter to Mr. Hudson, of which Mr.

Hudson was nice enough to remit to me a copy. I have a photostatic copy of it.

Q. Is that the one? A. Yes. That is dated May 27th, signed by Mr. Dismukes.

Mr. Rassner: I offer this in evidence.

Mr. Cushman: Here is the original.

Mr. Rassner: We will offer the original in evidence.

The Court: Any objection to this?

Mr. Cushman: No; except the objection heretofore made to the others. They are not material to the plaintiff's cause of action.

The Court: I will reserve ruling on the objection. It will be marked for identification as 1-F.

(The document referred to was thereupon marked, [79] "Plaintiff's Exhibit 1-F.")

Mr. Rassner: I would like to read it into the record:

"University of Miami, May 27, 1955. Mr. Hudson, Mercantile National Bank of Miami Beach, 420 Lincoln Road, Miami Beach, Florida. Dear Mr. Hudson:

"There is a translation of the cablegram dictated to me on the telephone by Mr. Rubenstein:

"'Since you consider Mercantile agreement final telegraph your agreement so we may ask Mercantile to confirm to us stop Mercantile makes irrevocable agreement to reimburse draft amount 13th December, 1955 stop. Greetings.'

"Trusting that this will prove satisfactory, Very truly yours. W. P. Dismukes, Chairman Department of Modern Languages."

Mr. Cushman: I want to make available to you this photostatic copy of the telegram as being the telegram translated by Mr. Dismukes.

Mr. Rassner: I offer this in evidence.

The Court: Subject to the same objection which I will rule on later, it will be received for identification as 1-G.

(The document referred to was thereupon marked, [80] "Plaintiff's Exhibit 1-G.")

Mr. Rassner: Now, is there any question, Mr. Cushman, as to the translation?

Mr. Cushman: I have no question of translation at this time.

*By Mr. Rassner:*

Q. Is that a correct translation? A. It appears to me to be a very correct translation.

Q. After the telegram was sent were the funds sent to the United States—your money, was it sent to the United States? A. Yes; it was ordered to be paid to me immediately.

Q. How did that money come from Europe to the United States? A. Well, the French company which owed the money to me, had an account for the Banque Francaise, which particular bank has an account of about $10,000 standing in New York. So they took the amount of $228,000 out of the general account and put it in my account in the same bank.

Q. What bank? A. National City Bank.

Q. Go ahead. A. And then the National City Bank was ordered to, by a certain telegram to the bank by the French company, to pay [81] me.

Q. And you agreed with Mr. Hudson, that was the way it was done? A. Yes. I was advised by Frence, you have

got the money unconditionally, and please be very prompt in finishing the contraction because the French Minister of the Navy threatened to withdraw the subsidy if you are not going to be prompt. I expected to be all finished within 60 days.

Q. How long after the 1st of June did you ask for your money? A. After the 1st—I asked for my money at the very minute when Mr. Hudson in person advised me he had my money on his desk.

Q. Can you give us the date of that? A. June 1, 1955, at 4:10, I think, in the afternoon, at the telephone in your own offices, at the desk of Mr. Rubenstein. I called Mr. Hudson that I would immediately be at his office. I was there and I was at the desk at 4:40.

Q. With whom? A. Nobody else; with Mr. Hudson and myself. Mr. Hudson presented me the telegram that we have here on exhibit, and told me that it was partly in French, and he had not the translation, so I volunteered to give him a translation, and it is the translation that has been given.

[82] Q. You agree that it is a correct translation? A. Yes.

Q. That is what you told him? A. That is all. Then Mr. Hudson, he was unable to pay me the money for that time I understood it was 4:45 or 4:50 and the office closes at 5. I did not see any reason why I should rush, and I told him I would come the next day with Mr. Rubenstein. I do not remember the hour. I think it was the early part of the afternoon. That was on June 2nd. I do not remember exactly, but there was very little conversation, and Mr. Hudson advised me and Mr. Rubenstein that we have to go up to another floor, I think, to the offices of Mr. Cassel, who is attorney of the bank, and I said that I do not understand.

Q. Do you see Mr. Cassel here? A. I do not think he is present at this time.

Mr. Cushman: He is outside. Do you want him?
Mr. Rassner: I would like to have Mr. Cassel here. Since we are talking about Mr. Cassel, I think Mr. Cassel should be here.

(At this time Mr. Cassel entered the room.)

Q. Is this the gentleman, Mr. Cassel? A. I think he is Mr. Cassel.

Q. Then you had a conversation with Mr. Cassel? A. I had not myself.

[83] Q. Did you go with Mr. Hudson to Mr. Cassel's office? A. Yes.

Q. That was June 2nd? A. June 2nd, around 4 or 4:30. And then we waited in the waiting room for some time, and then we sat, Mr. Rubenstein, Mr. Hudson and myself, inside. Mr. Hudson started the conversation; advising Mr. Cassel why I came here, and he read the telegram that had been quoted, and asked Mr. Cassel for an advice. After Mr. Hudson had a conversation, Mr. Rubenstein made a certain number of comments, which I do not remember, but which are known, and Mr. Cassel then told Mr. Hudson, "Well, Mr. Hudson, it is clear that you have given a guarantee there", and well, the money has been sent. Then I then entered the conversation myself and said, "Mr. Cassel, why don't you pay me?" Mr. Cassel said, "No; we will not pay you." Well, although the meeting was very courteous, I considered it very bad mannered for a first-class bank to enter into an agreement, and I quit, and we left. We went down with Mr. Hudson. We shook hands with Mr. Hudson about 5 or 5:10 and I left for my hotel.

Q. Did you ever get the money? A. No.

Q. Did you make any subsequent demand for it? A. I demanded the money by telegram and by letter sent by Mr. Rubenstein as an agent and attorney.

[84] Q. In any event, you made several demands? A. Yes.

Q. Orally, and in writing and by telephone? A. Yes.

Q. Of whom did you make the demands? A. To Mr. Hudson; to Mr. Adelson and then I did not see any more of the gentleman, and I put it in writing through my attorney, which receipt has been confirmed both by them and by Western Union.

Q. Is this a copy of the letter which you sent to the Mercantile National Bank? A. That is something different. That is something after they had been put on notice that here was my money and they should pay me, and I notified them than on any payment was interest accuring at a certain rate per day on the risk of losing my subsidy and losing the charter, which was expressed by millions. In addition to that paper, he was put on notice to change the physical location of the money.

Q. Mr. Bourgeois, in addition to the requests which you have testified to, did you have Keesing & Keesing, attorneys of New York, send a letter, of which this is a copy; yes or no? A. I asked the bank to notify Keesing & Keesing. I do not know if they did or not.

Mr. Rassner: I offer this letter in evidence.

[85] Q. And then you wrote the letter of which this is a copy? A. Yes.

Mr. Cushman: To which we object upon the same ground as assigned to the proceding documents.

The Court: The objection will be ruled on later. Receive for identification as 1-H.

(The document referred to was thereupon marked, "Plaintiff's Exhibit 1-H.")

Mr. Rassner: I would like to read this:

"June 22, 1955, Mercantile National Bank of Miami Beach, 420 Lincoln Road, Miami Beach,

Florida. Attention: Mr. D. B. Hudson. Mr. Louis C. Adelson. Gentlemen:

"Please pay to the Chase Manhattan Bank of New York, 250 West 57th Street, New York Branch, for account of Pierre Bourgeois, $228,570 less $200 (net $228,370 from funds transferred to my account by Banque Francaise du Commerce Exterieur).

"Please notify Keesing & Keesing, attorneys, at above address, at the same time as myself. Yours truly, Pierre Bourgeois."

*By Mr. Rassner:*

Q. Did you send the original of that letter or give [86] the original of that letter? A. I handed the letter by hand to Mr. Hudson on that day.

Q. That was after you made several demands to turn the money over to you? A. Yes.

Q. Did they do that? A. So far I don't know.

Q. Did you ever get any of that money? A. Never.

Q. Was there an arrangement made for—stipulating the amount of damages of each day delay for the completion of each ship in your contract? A. Yes; $2,000 a day per ship.

Q. Do you have that contract with you? A. Yes.

Q. Was that $2,000 for each ship each day delay? A. That is right.

Q. Do you have that contract here? A. Yes.

Mr. Rassner: I offer the contract in evidence on the question of damages.

Mr. Cushman: To which I object on the ground it is not relevant or material on the issue of [87] damages and on the further ground the complaint does not allege any fact or circumstances which would con-

stitute a predicate or basis in the pleadings for any claim of special damages, and this contract is not material upon any claim of damages, special or general.

The Court: Subject to the objection, which I will rule on later, the document will be marked for identification as 1-I.

(The document referred to was thereupon marked, "Plaintiff's Exhibit 1-I.")

Mr. Rassner: If the Court please, after consideration of this paper has been had by the Court, may we have it withdrawn?

The Court: It certainly can be done later on appropriate motion and hearing. If a copy is substituted I am sure there will be no objection to withdrawing your original.

Mr. Cushman: That is correct; there will be none.

Mr. Rassner: At this time, if the Court would entertain a motion to conform to the proof and—

Mr. Cushman: I object to that. I do not know what the request is now made to amend.

The Court: You may later, after the evidence is in and closed, make any motion for an appropriate [88] motion on the proposed amendment. However, it should be in writing and I will then later hear and rule on your motion for leave to amend.

Mr. Cushman: If your Honor please, in view of the provisions of Rule 1.15-B of the Florida rules of civil procedure, I should like the record to show that the defendant has not agreed, by implication or expressly, to try any issues except those made by the amended complaint and the answer, and we would not like to have any failure to make objection taken as a willingness to litigate any other matters.

The Court: I understand that. If the motion for leave to amend to conform to the proof which may be made later, should be granted, then it may be that in the interests of justice you will be entitled to a continuance, but we have not crossed that bridge yet. I understand your position.

Mr. Cushman: Thank you so much, your Honor.

The Court: It is not the Court's intention to prejudice the defendant by permitting the presentation of issues other than which the defendant is now prepared to try.

Mr. Cushman: All right, sir. Thank you.

*By Mr. Rassner:*

Q. Mr. Bourgeois, the contract which has just been [89] offered in evidence, is that similar to the other contracts which you have? A. Which ones; with the same company?

Q. Yes. Are they all alike? A. There are three contracts, and it is only the price which is changed, where there is a difference of $50,000 in one and $100,000 in the other.

Q. How is that $2,000 a day damages construed—how is that determined? A. Well, it is in maritime practices.

Q. In what countries is that maritime practice? A. I am not an authority in the matter.

Q. It is a custom of the trade? A. It is a general custom in the trade, which is not only in this country and Western European countries at this time, but has always been through the ages since the Greeks and the Romans. It is always the same rules.

Q. I am talking of the $2,000 per day. How is that fixed? A. That was fixed after a certain number of negotiations, taking into consideration the Shell and Standard contracts, the Russian Government contract.

Q. I know it is in the contract we offered in evidence, but give us the substance under which you agreed at [90] $2,000

instead of $1,500 or $2,500? A. I will tell you. I had in my possession the Esso Standard contract, and the Shell contract, and the Russian Government contract—I had not in my possession the Russian contract—and that contract giving an average of about $1,500 per day on dilatory action of any type.

Q. By dilatory you mean delay? A. Yes; anything that is dilatory in the earning capacity of the contract. The earning capacity of the contract is the vessel that is plying between one port and another for the company.

Q. By that do you mean delay, when you say dilatory? A. Yes.

Q. Go ahead. A. So I told them if they wanted that I sign a contract, I would only sign it with a penalty which is $2,500. That was explained for special reasons because my own expenses—

Q. You are going into a lot of details. You settled for $2,000 as a compromise? A. Yes.

Q. In your opinion, as an expert, based on your experience, are you in a position to state whether $2,000 per day for each day delay of each vessel was a reasonable amount under the circumstances; yes or no? [91] A. Yes.

Q. And in your opinion, was it? A. It was.

Q. And was that approximately what was the amount called for in all similar contracts throughout the civilized world in merchant marine shipping? A. More or less, taking into account the ship specifications and finances.

Q. Is that the usual amount for that type of vessel? A. For that type of particular vessel, I would say so.

Q. And in your opinion it was reasonable? A. It was fair.

Mr. Rassner: If the Court please, I think I am finished, but I would like to confer with counsel.

The Court: All right, let us have a recess until 12:30, by this clock.

(Thereupon a short recess was taken, after which the following proceedings were had:)

Mr. Rassner: If the Court please, that is all the questions we chose to put to the plaintiff at this time.

Mr. Cushman: I construe that to mean you are tendering him for cross-examination?

[92] Mr. Rassner: Yes, sir.

*Cross-examination by Mr. Cushman:*

Q. Mr. Bourgeois, the judge asked you at the very beginning to state your residence address, and I understood you to say it was 3925 Collins Avenue, Miami Beach. A. At this time, yes.

Q. He also asked you to state your business address. A. I have given that information.

Q. Give it again. A. Well, I have been doing business in my attorney's office in New York.

Q. What is that address? A. Care of Thomas G. Proctor, attorney, 84 Williams Street, and I have also business in Switzerland, and I have been doing temporary in France too.

Q. You have a place of business in France; one in Switzerland, and one in New York, in the office of an attorney; is that your testimony? A. Yes.

Q. You have no business address here in Florida? A. Well, it is a personal business that I have, so wherever I am is my business address.

Q. You say you have a degree of Doctor of Civil Law [93] from where? A. Lauren University, in Paris, France.

Q. When was it you received that degree? A. 1925 or 1926. I think Mr. Rassner has a photostat of it.

Q. When you received a degree of Doctor of Civil Law in France, that was necessary or customary to qualify a person as a lawyer in France; is that not correct? A. Well, let us say that the difference would be if somebody was an engineer.

Q. Well, when you got a degree as a Doctor of Civil Law in the university was that the same thing as a legal education? A. Yes.

Q. Now, I understood you to say you were also offered, but did not receive, a position as Minister of Finance and Commerce in the DeGaulle government? A. Which was taken by my good friend, Mendes-France after that.

Q. You also said on account of your knowledge of international matters you were given some kind of position; did I understand you correctly? A. What position?

Q. I do not know. I do not recall. Did you not say [94] that you had been given some sort of position or assignment because of your knowledge of international matters? A. I told you that I was of an age to be mobilized, and as an officer in the French army, and because of my knowledge of international matters I received from the French government a mission to do certain things for the French government on orders.

Q. Thank you. That is the answer to my question.

Mr. Cushman: In order there may be no misunderstanding, you invited Mr. Cassel in the room. Do you now want him to retire?

Mr. Rassner: Oh, no; he can stay.

Q. Now, your knowledge of international matters—did you mean by that you were given that duty to perform because of your knowledge of international finance and international law and international relationships? A. Because for ten years I was a general export manager of the

No. 1 or No. 2 French company, and I visited all countries in the world except, let us say, five or six minor countries, and I was well versed in matters in Switzerland where I was president of a subsidiary company, of the plant we had there.

Q. On the 16th of May, 1955, when you first saw Mr. Hudson at the Mercantile National Bank, you at that time [95] signed a promissory note in favor of Ciotat for $228,570, did you not?

Mr. Rassner: I consent to it at this time.
The Witness: Yes.

Q. This is the original of the note? A. Yes.

Mr. Rassner: There is no dispute about it.
Mr. Cushman: We offer it in evidence.
The Court: Received in filed in evidence as Defendant's Exhibit 4, marked D-4.

(The document referred to was thereupon marked, "Defendant's Exhibit D-4.")

*By Mr. Cushman:*

Q. Now, it is a fact, is it not, when you and Mr. Rubenstein first contacted Mr. Daniel B. Hudson, and talked to him, he stated to you in substance or effect that it appeared to him that what you wanted required some kind of guarantee that he could not authorize, and that the bank could not make? A. I do not remember that.

Q. You do not deny that is what he told you, do you? A. I think I would deny under that form.

Q. Well, what did he tell you about that? Give me your recollection, please, sir. A. As I testified already, there was very little talk. There was writing, and as far as I

remember, there was [96] a letter that was not composed by myself at all. It was written, I think, in longhand, by Mr. Hudson, and I objected only to one word, on which we discussed for ten or fifteen minutes, and I think Mr. Hudson accepted the change, and that is what produced the letter which is in exhibit here.

Q. Exhibit 1? A. No; various numbers.

Q. 1-A and 1-C? A. Probably.

Q. What was the one word you discussed for about 15 minutes. A. I do not remember. Would you ask Mr. Hudson to produce the draft and we might see the correction?

Q. Can you look at these exhibits, 1-A and 1-C, and tell me what word it was? A. I asked for the draft of the letter, not the letter.

Q. I do not have it. Do you have it? A. No.

Q. My question is, what word was discussed for 10 or 15 minutes? A. I cannot tell you any more because it was on the draft; the correction.

Q. Did you and Mr. Hudson at any time during that [97] occasion discuss the matter of the ability or willingness of the Mercantile National Bank to make any kind of guarantee that represented the handing of its credit to you?

Mr. Rassner: Just a moment. Does our objection stand for this cross-examination as well?

The Court: Yes; if you wish.

Mr. Rassner: Yes. May I have the record show we object to a discussion of whether or not there was a guarantee. That is entirely immaterial.

The Court: All right, the objection is noted and will be ruled on later.

The Witness: I retained the Mercantile National Bank, represented by Mr. Daniel B. Hudson, a representative of the bank, to collect the money due

me, and I told him I had the money due to me, and I wanted the money here as promptly as possible, and apparently the French wanted some letters, which are those letters which he composed and signed, which were sent to the French, and which we are discussing.

*By Mr. Cushman:*

Q. Did you hear the question I asked you? A. Yes.

Q. Did you understand it? A. Well, I understand it for the answer as I gave you.

[98] Q. My question was— A. I do not—

Q. Just a minute. My question was, did you at that time discuss with Mr. Hudson the willingness or ability of the Mercantile National Bank to make any kind of guarantee which involved lending of its credit? A. We did not discuss that part; definitely not.

Q. You had a discussion about a French word called aval, did you not? A. We did not have at that time. The word was not even pronounced.

Q. Probably he did not pronounce it right. A. It was not. The reply is no.

Q. Did you at some other time discuss the French word aval? A. During your taking my deposition on July 18th, I think; not before.

Q. I understood you to testify in answer to questions, or a question by Mr. Rassner, that you explained to Mr. Hudson that an aval was not a guarantee. Did you not say that yourself?

Mr. Rassner: I object to the form of that question, stating as to what I had stated. I have no objection to counsel asking the substance of the question.

The Witness: Would you be kind enough to repeat [99] the question that he put, and on which he asked me an answer?

Q. I am willing to let my question stand. Give me an answer. A. My answer is the same as given to Mr. Rassner.

Q. What was it? A. May I get it?

Q. No, sir; you may not. Answer the question. A. That myself; I gave—I was giving. At that time when I made the reply in Court of the meaning of the word aval which is what I have contracted myself. It has nothing to do with your bank and has nothing to do with anyone else—with myself.

Q. Is it not a fact that Mr. Hudson did tell you that the bank could not and would not make or enter into any kind of agreement which represented a guarantee of any obligation you made to Ciotat? A. It was never discussed.

Q. Did you not tell Mr. Hudson, or Mr. Rubenstein told Mr. Hudson in your presence or hearing that Ciotat and the Bank of France did not require and did not expect any kind of guarantee of any obligation on your part as far as the Mercantile National Bank was concerned? A. We discussed only the text which was produced.

[100] Q. Is it not a fact that you and Mr. Rubenstein told Mr. Daniel B. Hudson on May 16, 1955, the only thing that was desired, expected or required by Ciotat or the Bank of France of yourself was an understanding on the part of the Mercantile Bank if and when the sum of $228,570 should be repaid by you to or for the account of Ciotat, that the Mercantile National Bank would transmit that amount of funds to Ciotat or the Bank of France in certain specific type of currency, that is to say, American dollars? A. No. My contract is that money is deducted from my account and never to be repaid. The amount of money which is owed to me is much higher, and only for

the regulation of the Bank of France it has to be done, that they have to have a receipt, which is in the form of a note.

Q. That note which you say— A. That is representing a receipt and withdrawn automatically because the amount of money due to me is much higher.

Q. Well, the receipt which you refer to in the form of a note is Defendant's Exhibit D-4? A. Yes.

Q. Now, is it not a fact, please, sir, that when you went to see Mr. Alvin Cassel in his office, that Mr. Cassel told you and Mr. Rubenstein, in your presence and hearing, that [101] under no circumstances would the bank agree to release to you the sum of $228,570 unless and until the bank received a definite written agreement in the form of a letter signed by an officer of Ciotat or the Bank of France stating definitely that no agreement or obligation rested upon the Mercantile National Bank to guarantee the repayment of the sum of $228,570 in the event you failed to pay it on December 13, 1955?

• • •

The Witness: I was not interested at all in anything Mr. Cassel would tell me or tell Mr. Hudson or tell Mr. Rubenstein, because it was on the 2nd of June, at 4:30 p. m., and I was the owner of that money for a long time, and the money had to be disbursed to me, and that is all.

*By Mr. Cushman:*

Q. Is it not a fact that on the occasion when you were in the office of Mr. Cassel, you and Mr. Rubenstein and Mr. Cassel had present before you, and that you discussed this telegram which is marked Defendant's Exhibit D-1, and the [102] translation, Exhibit D-1-A? A. I do not think the original was—

• • •

Q. Do you remember the question? A. Yes. Mr. Hudson had this particular translation and probably the original in his hand, and showed it to Mr. Cassel.

Q. When you refer to the translation, you are talking about the translation, Defendant's Exhibit D-1-A? A. Correct.

Q. Now, I believe you said that the translation, Defendant's Exhibit D-1-A, is a very good translation?

Mr. Rassner: We do not have to characterize it. It is a correct translation.

Mr. Cushman: Very well.

The Court: It cannot be any better than correct, can it?

Q. Is it not a fact, Mr. Bourgeois, that at the [103] conference in the office of Mr. Cassel, that Mr. Rubenstein, in your presence and hearing, stated or argued with Mr. Cassel that this telegram as translated, Defendant's Exhibit D-1-A, did not bind or obligate the Mercantile National Bank of Miami Beach to repay to Ciotat the sum of $228,570 represented by the note in the event of your default or failure to pay it on the due date of that note, whatever the ground of your failure to do so might be?

* * *

The Witness: My reply is the same as before.

Q. What was your reply; was that said or not? A. I was not interested at all.

Q. I am asking you if it is not a fact that Mr. Rubenstein insisted that did not constitute a guarantee? A. I never saw in my life Mr. Rubenstein insist on anything.

Q. It is your testimony he did not insist? A. Yes.

Q. Will you tell me whether Mr. Rubenstein stated in substance or effect that the language of this telegram, [104]

Defendant's Exhibit D-1-A, did not constitute a contract or guarantee by the bank to pay your note in the event of your default or failure to pay it? A. I think we would both agree to rely more on the opinion of Mr. Cassel who notified Mr. Hudson it was a guarantee.

Q. Well, what is the answer to the question I asked you?

Mr. Rassner: I believe that is answered.

Mr. Cushman: May I get it?

The Court: That question has not yet been answered.

The Witness: Well, I could not reply on that because I was not particularly interested. I was interested only to know if—

The Court: Your answer is you do not know?

The Witness: I do not know.

Q. I will ask you if it is not true that you yourself stated to Mr. Cassel on that occasion that the language of this translation or this telegram, Exhibit D-1-A, did not in any sense whatever bind or obligate the Mercantile National Bank to pay your note on the due date in the event you failed to pay it, and that his insistence that it did too bind the bank was incorrect, and that you insisted he was wrong in that opinion? A. I was not asked the question by Mr. Cassel. The only talk that I put at that particular conference was the talk, [105] myself notifying Mr. Cassel I was demanding the money, and since he recognized the various facts, I was in a position to demand the bank to go through with the obligation to pay the money, and he told me he would not, and I decided that was the last time I would talk with the bank.

Q. Is it not a fact that Mr. Cassel on that occasion told you and told Mr. Rubenstein in your presence and hearing,

that if you would spend as much time getting from the Bank of France and Ciotat a definite statement that a guarantee to pay your note was not expected or required, as you expended on arguing the money with him, that you would have the money much quicker? A. No; and I was not interested. That was my money and I wanted the cash, and that is all.

Q. Now, you recognize and you agree, of course, that the $228,570 was deposited by the First National City Bank or Chase Manhattan Bank pursuant to and in accordance wtih the provisions or conditions or the terms stated in this telegram, Defendant's Exhibit D-1-A, do you not?

Mr. Rassner: If the Court please, I believe that is a matter for the Court's decision.

The Court: Let him answer it. I will rule on the objection later.

The Witness: I was advised by the French they had [106] sent the money unconditionally.

Q. Well, were you advised by telegram? A. I was advised by telephone and by a short paragraph in a letter of a member of my family.

Q. Let us see the letter. A. I haven't it here. It was just advising the money had been sent unconditionally.

• • •

Q. Which bank? A. Mercantile National Bank of Miami Beach. You have the language talk for itself—"you have the money—please pay Pierre Bourgeois".

Q. That is all it says? [107] A. "In that condition pay Pierre Bourgeois".

Q. In that condition pay Pierre Bourgeois? A. The exact translation "in that condition" should be "because of these" but it is that way satisfactory.

Q. Do you contend that the Mercantile National Bank ever did agree to pay your note if and when it became due on December 13, 1955?

• • •

The Witness: Well, as I told you, I retained the bank through the person of Mr. Hudson, assistant vice-president, for the purpose of collecting this money. I advised that the French regulations requested that a certain letter or cable be sent and accepted by the French, and should be sent, which he accepted. I advised him that I have a contract with them—in fact three contracts, to receive this money; that the original contract is for an amount of $900,000, and that the president of the Bank of France himself told me it was too much to give at one time, and so finally, to please them, and having the money still due over there, I accepted to a transfer of $228,570, which, [108] as mentioned in the contract, was to be deducted in the general accounting, and actually never to be repaid.

However, in order to show to the French there was no favor to be done, as they requested they have an aval given by the bank, which has been done through the years, which after the French suggested that word, and I think it was a very good idea. I do not say I have contracted for these 10 words. I have nothing to do with these 10 words. They were put on the desk of Mr. Hudson, and he checked with Mr. Dismukes, and he agreed to the wording. I do not understand exactly what the wording would have meant, but I suppose as a banker he was satisfied with the wording. The money was in the account of my name and—

*By Mr. Cushman:*

Q. Just a moment. I am going to ask you the question again and ask you to listen to it, please. Do you claim and do you contend now in this case that the Mercantile National Bank ever made an agreement or assumed an obligation to pay the note of Pierre Bourgeois in the sum of $228,570 on December 13, 1955, if you, Pierre Bourgeois, failed to pay it for any reason whatsoever, and I will ask you first now, do you understand my question? [109] A. I understand your question.

* * *

*By Mr. Cushman:*

Q. Do you understand the question? A. Well—

Q. Yes or no; do you contend that the Mercantile National Bank obligated and bound itself to pay your note on [110] December 13, 1955 if you did not pay it; that is my question?

The Court: The witness may confer with counsel if he wishes before answering the question.

The Witness: All right.

(Thereupon the witness conferred with counsel.)

Mr. Rassner: I think the witness has the question in mind. Would you mind answering?

The Witness: Well, I consider that an aval is not a guarantee, and the test of the cable received and repeated by the bank is supposedly evidence of what it meant.

*By Mr. Cushman:*

Q. You do not contend that the Mercantile National Bank ever undertook to guarantee payment of your note on

December 13, 1955, if you failed to pay it? A. It was not necessary. I had money due to me several times that much, and we had to do it because of the regulation in France.

Q. Your answer is now; no, you did not expect the guarantee of the payment of any note at all; is that your answer?

The Court: Yes; that is his answer.

Q. Will you please confirm for me the fact that it is true; you did not intend at any time to ever repay this note, Defendant's Exhibit 4, in American dollars, by paying [111] that amount of money, $228,570 to the Mercantile National Bank of Miami Beach? A. No, the French contracted with me to withdraw the note. I had money due in excess of that, at that time, of a million dollars. That was understood, and he—

Q. Did you have a written contract? A. For the bank to do that, it would be a nice account for the bank to keep.

Q. It is true, at the time you first went to the bank on May 16, 1955, and at the time the letters, Plaintiff's Exhibit 1-A and 1-C were written, that note, Defendant's Exhibit D-r, was then turned over to Mr. Hudson, and it is the note referred to in these two letters? A. That is right.

* * *

[112] Mr. Rassner: We intend to close the plaintiff's case.

The Court: All right, plaintiff rests.

Mr. Cushman: All right, sir. We would like to make a motion in the record for the consideration of the Court.

The Court: All right, dictate it in the record.

Mr. Cushman: At the close of the plaintiff's case, defendant moves the Court to direct a verdict in favor of the defendant, and dismiss plaintiff's suit on the ground

that plaintiff has failed to prove any of the material allegations of his complaint, and has failed to establish any cause or causes of action upon which the plaintiff would be entitled to a judgment, or any relief in this suit for the following [113] reasons:

First, the complaint is based upon the theory of trover and conversion, and the evidence fails to disclose any fact which would entitle the plaintiff to recover in an action of trover under the laws of this state because it does not appear, first of all, there was any obligation on the part of Mercantile National Bank, under any circumstances whatever, to deliver any specified chattel or specie to Mr. Bourgeois.

Secondly, it does not appear Mr. Bourgeois was legally entitled or had any legal right or interest in the sum of $228,570, or that he had the immediate right of possession thereof at any time prior to the commencement of this suit or at any time since that time.

Thirdly, we submit that the plaintiff's case has not established that the Mercantile National Bank of Miami Beach received the sum of $228,570 under such circumstances or under any circumstances which, as a matter of law, obligated the Mercantile National Bank of Miami Beach to pay or disburse that sum to Pierre Bourgeois.

Fourthly, because it affirmatively appears from [114] the testimony and evidence in the case that the sum of $228,570 was deposited by First National City Bank of New York to the account of Mercantile National Bank in the Chase Manhattan Bank of New York subject to certain terms and conditions which constituted it a special deposit pursuant to which the title was retained by which Ciotat or the Bank of France, unless and until the conditions stated in the telegram, Defendant's Exhibit D-1, were met or agreed to by Mercantile National Bank; that such were never

agreed to and therefore the title to those funds never passed from Ciotat and that Mercantile National Bank of Miami Beach never did acquire any title to it and never did accept that sum pursuant to that deposit.

Fifth; because all of the exhibits, including the letters, Defendant's Exhibit 1-A and 1-C, and the telegrams, particularly the telegram identified as Exhibit 1-D, the telegram identified as Exhibit 1-E and the telegram identified as Exhibit 1-B, no one of them or all of them taken singularly or collectively, constituted as a matter of law, any kind of agreement or undertaking on the part of Mercantile National Bank of Miami Beach to guarantee the payment of the note executed by Pierre Bourgeois in the favor [115] of Ciotat due and payable on December 13, 1955.

Sixth; that it affirmatively appears from the testimony and evidence before the Court that there never was any meeting of the minds and no contract came into existence between Mercantile National Bank of Miami Beach on the one hand, and Ciotat and the Bank of France on the other hand because there never was any agreement by both of those parties upon the same proposition. That is to say, there never was any agreement on the part of Mercantile National Bank of Miami Beach to guarantee the payment of the note of Pierre Bourgeois on December 13, 1955 in the event he failed to pay it, and it affirmatively appears that Bank of France and Ciotat required and insisted that such a guarantee or agreement be made by Mercantile National Bank of Miami Beach as an express condition upon which the sum of $228,570 should be paid to or disbursed to Pierre Bourgeois, and that condition having never been accepted or agreed to by Mercantile National Bank, there never was any contract or obligation or liability on Mercantile National Bank to make such a disbursement to Pierre Bourgeois.

Seventh; upon the ground, as a matter of law, the bank had no authority to lend its credit to Pierre Bourgeois or to the Bank of France or Ciotat, by [116] guaranteeing the payment of the note of Pierre Bourgeois if he failed to pay it on December 13, 1955, and such an agreement, even if it had ever been made, was ultra vires and void and not enforcible.

Eighth; it affirmatively appears from the testimony and admissions of the plaintiff himself that plaintiff, Pierre Bourgeois, never did in fact intend to pay the note, Defendant's Exhibit D-4, due December 13, 1955, in cash or American currency, at the Mercantile National Bank of Miami Beach, in accordance with the tender and effect of that obligation.

Ninth; that there is no competent evidence or proof of any damages to which the plaintiff might claim himself to be entitled, and for those reasons we move the Court to direct a verdict in favor of the defendant.

We add to that the ground the complaint itself fails to state a cause of action or a claim upon which relief can be granted.

The Court: The Court will hear argument of counsel in support of and opposition to the motion on Tuesday afternoon at 1:30, and we will recess until then.

(Thereupon the hearing was adjourned until Tuesday, November 15, 1955, at 1:30 o'clock p. m.)

*Motion for Judgment*

[117] IN THE

CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 33803-G

[SAME TITLE]

Miami, Florida,
Tuesday, November 15, 1955.

The above-entitled cause came on for further hearing before the Hon. Vincent C. Giblin, Judge of the above-styled Court, at his office in the Courthouse, Miami, Florida, on Tuesday, November 15, 1955, at 1:30 o'clock p. m., pursuant to adjournment on Saturday, November 12, 1955.

Appearances:

FRED KLEIN, Esq., and
GERARD EHRICH, Esq.,
Attorneys for plaintiff.

L. J. CUSHMAN, Esq., and
LEWIS HORWITZ, Esq.,
Attorneys for defendant.

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[118] The Court: I will hear argument of counsel now on the motion before the Court.

(Thereupon counsel argued to the Court.)

*Motion for Judgment—Granted*

The Court: I will grant the pending motion. I think there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

[119] I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant.

(Thereupon the case was concluded.)

[120] CERTIFICATE OF REPORTER

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

I, HAROLD STERLING, do hereby certify that the case of Pierre Bourgeois, plaintiff, versus Mercantile National Bank of Miami Beach, etc., defendant, pending in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, at Law, No. 33803-G, was tried before the Hon. Vincent C. Giblin, as Judge, on November 12, 1955 and also November 15, 1955; that I was authorized to and did report in shorthand the proceedings and evidence in said trial; and that the foregoing pages, numbered from 1 to and including 119, contain and are a true and correct transcription of my shorthand report of the proceedings of the said case.

IN WITNESS WHEREOF I have hereunto affixed my hand this 2nd day of December, 1955.

HAROLD STERLING,
Court Reporter.

## Plaintiff's Exhibit 1-A

LETTER, DATED MAY 16, 1955, FROM MERCANTILE NATIONAL BANK TO BANQUE FRANCAISE DU COMMERCE EXTERIEUR, PARIS, FRANCE

Our bank has accepted a note guaranteeing, without reserve payment in the amount of $228,570, such executed by Client Pierre Bourgeois, to the order of Chantiers Navals de La Ciotat, payable on or before December 13, 1955.

We shall hold it for their account and receive the payment thereon and guarantee that such monies will be forwarded to them and payable in U. S. funds, American dollars, on New York bank, New York, U. S. A.

Upon receipt of this letter, we shall beg that you kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach, Florida, for the account of Pierre Bourgeois, as contracted. Very truly yours, D. B. Hudson.

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## Plaintiff's Exhibit 1-B

CABLEGRAM, DATED MAY 27, 1955, FROM MERCANTILE NATIONAL BANK TO BANQUE FRANCAISE DU COMMERCE EXTERIEUR, PARIS, FRANCE

Mercantile makes irrevocable agreement to reimburse draft $228,570 described our letters May 16 to you and Ciotat which constitutes our guarantee in full. Mercantile National Bank of Miami Beach.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

SPECIAL DIVISION B

PIERRE BOURGEOIS,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Appellee.

CASE NO. 28,495

Opinion filed June 5, 1957

An Appeal from the Circuit Court for Dade County, Vincent C. Giblin, Judge

Rassner, Miller & Roth, for Appellant

Broad & Cassel and L. J. Cushman, for Appellee

## Plaintiff's Exhibit 1-C

LETTER, DATED MAY 16, 1955, FROM MERCANTILE NATIONAL BANK TO CHANTIERS NAVALS DE LA CIOTAT, PARIS, FRANCE

Our bank has accepted a note guaranteeing without reserve payment in the amount of $228,570, such executed by Client, Pierre Bourgeois, to the order of Chantiers Navals de La Ciotat, payable on or before December 13, 1955.

We shall hold it for your account and receive the payment thereon and guarantee that such monies will be forwarded to you and payable in U. S. funds, American dollars, by our check on a New York bank, New York, U. S. A.

Upon receipt of this letter we shall beg you to kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach, Florida, for the account of Pierre Bourgeois, as contracted. Very truly yours, D. B. Hudson, Assistant Vice-President.

---

## Plaintiff's Exhibit 1-D

CABLEGRAM, DATED MAY 23, 1955, FROM MERCANTILE NATIONAL BANK TO PARIS OFFICE, CHASE MANHATTAN BANK, PARIS, FRANCE

"Kindly advise Banque Francais Commerce Exterieur 21 Boulevard Haussman Paris that letters addressed May 16 to Bank & La Ciotat Paris, constitutes fullest reimbursement guarantee that an American bank can issue," as requested in their cable dated April 20, 1955 re La Ciotat Paris, Bourgeois New York & Miami Beach stop and consequently that we are looking for their immediate transfer of funds to Miami as requested stop we are advised further

delay damaging the chartering situation advised ready long ago and trust immediate actior will be taken by them stop we expect funde by telex. End. Mercantile National Bank of Miami Beach, Miami Beach, Florida.

---

## Plaintiff's Exhibit 1-E

CABLEGRAM, DATED MAY 27, 1955, FROM MERCANTILE NATIONAL BANK TO CHANTIERS NAVALS DE LA CIOTAT

Mercantile prends engagement irrevocable rembourser traite 228,570 dollars au treize Decembre 1955 stop. Mercantile National Bank of Miami Beach.

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## Plaintiff's Exhibit 1-F

LETTER, DATED MAY 27, 1955, FROM W. P. DISMUKES TO MR. HUDSON, MERCANTILE NATIONAL BANK

(Not printed)

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## Plaintiff's Exhibit 1- G

TRANSLATION BY W. P. DISMUKES

(Not printed)

## Plaintiff's Exhibit 1-H

LETTER, DATED JUNE 22, 1955, FROM PIERRE BOURGEOIS TO MERCANTILE NATIONAL BANK

Please pay to the Chase Manhattan Bank of New York, 250 West 57th Street, New York Branch, for account of Pierre Bourgeois, $228,570 less $200 (net $228,370 from funds transferred to my account by Banque Francaise du Commerce Exterieur).

Please notify Keesing & Keesing, attorneys, at above address, at the same time as myself. Yours truly, Pierre Bourgeois.

---

## Plaintiff's Exhibit 1-I

CONTRACT BETWEEN CHANTIERS NAVALS DE LA CIOTAT AND PIERRE BOURGEOIS

(Not printed)

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## Defendant's Exhibit D-1

NIGHT TELEGRAM, DATED MAY 31, 1955, FROM FIRST NATIONAL CITY BANK, NEW YORK CITY, TO MERCANTILE NATIONAL BANK

We have received the following cable from Banque Franciase du Commerce Exterieur. Paris France for transmission to you "nous avone recu votre telegramme ainsi libelle Mercantile makes irrevocable agreement to reimburse draft dollars 228,570. Described our letters May Sixteenth to you and Ciotat which sx constitutes our guarantee in full nous prenons acte que vous garantissez

inconditionneelment le remboursement a son echeance d'un billet detenu par vous de dollars 228,570. souscrit par Pierre Bourgeois de New York a L'ordre des Chantiers Navals de La Ciotat stop dans ces conditions nous vous faisonse virer par CitiBank New York dollars 228,570. pour etre portes au credit du compte sur vos livres de Pierre Bourgeois signed extecomexe'' stop in accordance with the foregoing we will transfer on June 1 to you through Chase Manhattan Bank New York NY $228,570 without responsibility on our part—

First National City Bank of N.Y.

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## Defendant's Exhibit D-1-A

TRANSLATION OF NIGHT TELEGRAM, DATED MAY 31, 1955, FROM FIRST NATIONAL CITY BANK TO MERCANTILE NATIONAL BANK

1955 May 31 PM 10,30

We have received the following cable from Banque Francaise du Commerce Exterieur Paris France for transmission to you ''we have received your cable reading as follows: Mercantile makes irrevocable agreement to reimburse draft dollars 228,570 described our letters May Sixteenth to you and Ciotat which constitutes our guarantee in full. We take notice that you guarantee nonconditionally the reimbursement at due date of a note held by you of dollars 228,570.00 subscribed by Pierre Bourgeois of New York to the order of Chantiers Navals de la Ciotat stop in these conditions we have being transferred by CitiBank New York dollars 228,570.00 to be credited to the account

with your bank of Pierre Bourgeois signed extecomexe'' stop in accordance with the foregoing we will transfer on June 1 to you through Chase Manhattan Bank New York NY $228,570.00 without responsibility on our part.

First National City Bank of N. Y.

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## Defendant's Exhibit D-2

(Not admitted)

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## Defendant's Exhibit D-3

CABLEGRAM, DATED JUNE 3, 1955, FROM MERCANTILE NATIONAL BANK TO BANQUE FRANCAISE DU COMMERCE EXTERIEUR

Re 228,570 Bourgeois—Ciotat: Transfer having not been made as demanded and expect we are compelled to withdraw. We await instructions. Mercantile National Bank of Miami Beach.

## Defendant's Exhibit D-4

NOTE, DATED MAY 16, 1955, SIGNED BY PIERRE BOURGEOIS PAYABLE TO THE ORDER OF CHANTIERS NAVALS DE LA CIOTAT

No. $228,570.00 May 16, 1955

Without reserve after date, for value received, I promise to pay to the order of Chantiers Navals de La Ciotat Two Hundred Twenty Eight Thousand Five Hundred Seventy and no/100 Dollars Payable at Mercantile National Bank, of Miami Beach, Florida with interest thereon at the rate of xx percent, per annum from xxx until fully paid. Interests payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest, and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at .... percent.

PIERRE BOURGEOIS (SEAL)

Due December 13, 1955

## Final Judgment of November 15, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law—Case No. 33803

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[SAME TITLE]

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The above-styled cause coming on for trial before me, without a jury, trial by jury having been duly waived, and the court having heard the testimony and evidence offered by the respective parties, and Defendant having duly moved for a directed verdict or finding in favor of said defendant at the close of the Plaintiff's case, and the Court having heard argument of counsel, and being duly advised in the premises, finds as a matter of law, upon the undisputed testimony and evidence offered by said Plaintiff that said Plaintiff is not entitled to recover upon his Amended Complaint in the above-styled cause, nor upon either count thereof, and that defendant is entitled, as a matter of law, to final judgment, it is therefore:

CONSIDERED, ORDERED AND ADJUDGED that said Amended Complaint of Plaintiff, Pierre Bourgeois be and same is hereby dismissed, with prejudice, and at Plaintiff's costs, and that Plaintiff take and recover nothing of and from said defendant, Mercantile National Bank of Miami Beach, Florida, a United States Corporation, upon his said Complaint, and that said defendant recover its costs, to be taxed upon motion and notice.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this 15th day of November, 1955.

VINCENT C. GIBLIN,
*Circuit Judge.*

Rassner, Miller & Roth, for Appellant

Broad & Cassel and L. J. Cushman, for Appellee

PER CURIAM:

Affirmed.

TERRELL, C.J., THORNAL & O'CONNELL, JJ., & SANDLER, Associate Justice, Concur

## Motion for New Trial

In the Supreme Court of Florida appeal from the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida.

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[Same Title]

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Comes now the Plaintiff, Pierre Bourgeois, and moves the Court for a new trial on the following grounds:

1. That the verdict was against the evidence.

2. That the verdict was against the law.

3. That the verdict was against the law and the evidence.

Monte K. Rassner,
Attorney for Plaintiff,
550 Brickell Avenue,
Miami 32, Florida.

## Order Denying Motion for New Trial

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law—Case No. 33803-G

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[SAME TITLE]

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Upon consideration of Plaintiff's Motion for New Trial it is

CONSIDERED, ORDERED AND ADJUDGED that said Motion be and same is hereby overruled and denied.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this the 29th day of November, 1955.

VINCENT C. GIBLIN,
*Circuit Judge.*

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Office Supreme Court, U.S.
FILED
SEP 3 1957
JOHN T. FEY, Clerk

# Supreme Court of the United States

**October Term, 1957**

**No. 424**

PIERRE BOURGEOIS,

*Petitioner,*

v.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

*Respondent.*

## PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

JACOB RASSNER,
*Attorney for Petitioner.*

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# Supreme Court of the United States

**October Term, 1957**

**No. .....**

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PIERRE BOURGEOIS,

*Petitioner,*

v.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Pierre Bourgeois, prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida rendered on June 5, 1957.

### Official Report of the Court Below

The opinion of the Supreme Court of Florida is officially reported in 95 So. 2nd 918.

### Jurisdiction

The opinion of the court below was filed on June 5, 1957. Judgment thereon was entered in the office of the clerk of the court on August 20. 1957.

Jurisdiction to review this decision is predicated upon Title 28 U. S. C. § 1254 and § 1257 (2 and 3).[1]

## Questions Presented

1. May a National Banking Act be invoked as a shield to protect a national bank from the consequences of its breach of the terms of a written contract? A national bank having agreed to represent its customer and collect funds for his account, in accordance with written specified procedure, including the making of an "aval", may it thereafter refuse to make such "aval", by asserting that doing so would be an *ultra vires* act, using its own interpretation that the word "avail" means guaranty?

2. When a national bank in Florida contracts to act as receiving agent for a special fund for its customer, can the said receiving bank refuse to perform its contract with its customer, after it has received the funds as agreed, by thereafter questioning the title to the funds?

## Reason for Granting the Writ

A national bank has arbitrarily and of its own volition assumed to grant itself immunity from the consequences of a breach of a written contract under circumstances where if a private bank or person had committed such a breach, the word "aval" means guaranty?

This would tend to destroy uniformity by absolving a national bank from the consequences or liability of its breach of contract under circumstances where all others would be held liable.

---

[1] *National Banking Act* (U. S. Comp. St. Sec. 9657, *et seq.*).

The statute involved is the *National Banking Act* of June 3, 1864 as amended by June 20, 1874, Chap. 343 § 1-18, Stat. 123 and amendments thereto.

Also U. S. C. Title 12, Chap. 2 §21, *et seq.*

## Opinions of the Courts Below

Petitioner prays for a writ of certiorari to review the decision of the Supreme Court of Florida filed on the 5th day of June, 1957, which is as follows:

"*Per Curiam*:

Affirmed.

TERRELL, *C. J.*, THORNAL & O'CONNELL, *JJ.*, & SANDLER, Associate Justice, Concur."

An appeal had been taken to said court, the highest court in Florida, from the decision of Circuit Judge Vincent C. Giblin, dismissing petitioner's cause of action on a directed verdict, judgment being entered on the 15th day of November, 1955, on the opinion dated November 15, 1955, which reads as follows:

"The Court: I will grant the pending motion. I think there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

[119] I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant.

(Thereupon the case was concluded.)"

See Appendix, pages 13-16.

## Statement of Facts

Petitioner had negotiations with "Mercantile"[2] which resulted in the sending of the following letters to "Banque Francaise du Commerce Exterieur",[3] Paris, France, and Chantiers Navals de La Ciotat, also of Paris, on May 16, 1955.

The letter to the French bank is found on pages 35 and 98 of the Appendix and states:

> "Our bank has accepted a note guaranteeing without reserve payment in the amount of $228,570, such executed by Client Pierre Bourgeois, to the order of Chantiers Navals de La Ciotat, payable on or before December 13, 1955.
>
> We shall hold it for their account and receive the payment thereon and guarantee that such monies will be forwarded to them payable in U. S. funds, American dollars, on New York bank, New York U. S. A.
>
> Upon receipt of this letter, we shall beg that you kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach, Florida, for the account of Pierre Bourgeois as contracted" (Plaintiff's Ex. 1-A).

The letter to Chantiers Navals de La Ciotat, Appendix pages 34, 99, Plaintiff's Exhibit 1-C, was almost the same with minor changes.

On May 23rd "Mercantile" sent a cable to the Paris office of Chase Manhattan Bank to advise "Banque Francaise" that the letters addressed May 16 to the French Bank and La Ciotat, Paris, "constitutes fullest reimburse-

---

[2] Mercantile National Bank of Miami Beach, Florida, hereinafter referred to as "Mercantile".

[3] Banque Francaise du Commerce Exterieur hereinafter referred to as "Banque Francaise".

ment guarantee that an American bank can issue" and consequently that it is looking for their immediate transfer of funds to Miami as requested (Appendix pp. 37, 99, Plaintiff's Ex. 1-D).

On May 27, 1955, "Mercantile" sent the following cablegram to "Banque Francaise" (Appendix p. 33):

> "Mercantile makes irrevocable agreement to reimburse draft $228,570, described in our letters May 16 to you and Ciotat which constitutes our guarantee in full" (Plaintiff's Ex. 1-B, Appendix p. 98).

As a result of these cablegrams by order of its client Chantiers de La Ciotat, "Banque Francaise" sent its order of payment to First National City Bank on May 31st.

Consequently, First National City Bank sent its night telegram of May 31st to "Mercantile".

The night telegram of May 31st states that National City Bank has "received the following cable from "Banque Francaise" for transmission to you".

> "We have received your cable worded thus:"

Then follows the identical words of the cablegram from "Mercantile" to "Banque Francaise":

> "Mercantile makes irrevocable agreement to reimburse draft dollars 228,570 described our letters May 16 to you and Ciotat which constitutes our guarantee in full."

This is the cablegram proven in this case (p. 24) and the very same words taken from the night telegram of May 31st (Defendant's Ex. D-1, Appendix p. 101).

This cablegram of "Mercantile" was accepted and acted upon by Cantiers Navals de La Ciotat and "Banque Francaise" sent its cablegram of May 31st to First National

City Bank. On May 31, 1955, First National City Bank sent a night letter to Mercantile, which is set forth in full as Defendant's Exhibit D-1A, Appendix page 102.

The transfer of the funds to the respondent for the use, benefit and credit of the petitioner is evidenced by the coded telegram received by respondent from Chase Manhattan Bank, referred to at length at pages 25 to 29 inclusive of the Appendix.

On page 103 of the Appendix there is a record of communication that was sent by "Mercantile" to "Banque Francaise":

> "Re 228,570 Bourgeois-Ciotat; Transfer having not been made as demanded and expected we are compelled to withdraw. We await instructions" (Defendant's Ex. D-3, Appendix p. 103).

The petitioner testified as to the facts of a number of contracts and shipbuilding contracts he was the beneficiary of, and which he had paid for, and for which he had invested in the past considerable sums of money (Appendix p. 63).

He also testified that in the matter presently litigated, and furthermore ruled in his favor against his co-contracting parties abroad, the "aval" contracted, and actually given by the defendant bank, was not a so-called "banking guaranty", and simply the forwarding by the collecting bank to the debtors of the money of the notice that it was his intent to fulfill the contracts on his side, as contracted (Appendix p. 66).

"Mercantile" had agreed in writing to become the agent of the petitioner, and had agreed as such to collect for his account certain funds due him in the sum of $228,570, and additional sums also due him thereafter, from his debtors and co-contracting parties in the Republic of France, Chantiers Navals de La Ciotat and "Banque Francaise", used by the former as their transmittal agent. And "Mer-

cantile'' had agreed with the petitioner, and did give on his behalf, the so-called ''aval'' (or notice of his later intent of fulfillment of his side of the contract), to his above mentioned present and later debtors (Plaintiff's Exs. 1-A and 1-C).

''Mercantile'' sent their own interpretation of the possible limitation of United States law to ''Banque Francaise'', thereafter mutually agreed upon between the debtor and ''Mercantile'', as agent for the said collection in favor of the petitioner, its client (Plaintiff's Ex. 1-D).

After all that was done, which lasted for a period of fifteen days, and the petitioner's own funds were released with the permission of the French Exchange Control Authorities, to the benefit of whom the ''aval'' clause had primarily been set in, such funds were put into ''Mercantile's'' account, for being paid immediately to him (Appendix p. 66).

After the several exchanges of correspondence between ''Mercantile'' and ''Banque Francaise'', ''Mercantile'' commenced ''hedging'' and seeking excuses for breaching its contract, putting into fallacious argument their own interpretation of the word ''aval'' and thought it would force the bank into the position of a guarantor, which according to their contention was an *ultra vires* act.

Evidence is that the word ''aval'' did not mean guaranty and the evidence is that there was no guaranty in fact. For the purpose of clarification, petitioner would like to point out that the money in question was in fact petitioner's money (Appendix pp. 89, 91, 94).

## Argument

The documents upon which petitioner predicated his cause of action is set forth in the statement of facts substantially in their entirety for the convenience of this Honorable Court.

The questions presented are ones of law. There is no issue of fact as the trial Court directed a verdict, therefore, the evidence must be given the most favorable construction to the petitioner's contention.

This principle of law is so well settled, throughout the country, that we will not burden this Court with many citations but desire to point out that Florida is no exception. *Yarborough* v. *Ball U-Drive System, Inc.*, 48 So. 2d 82 (Fla.).

Reduced to its practical application, we here have a businessman of many years' experience risking his own capital in industrial enterprise (Appendix pp. 60-66), making a written agreement with a national bank and then finding that the bank by its arbitrary interpretation of words and legal provisions, improperly using provisions of banking law as an excuse to recant on its freely undertaken commitments.

It would appear that there are no cases which support the action of the Supreme Court of Florida, or support the decision of Judge Giblin.

There does not seem to be any evidence in the case which would tend to support the finding by Judge Giblin that the effect of the "aval" would be a banking guaranty. We would like to point out that the very notice of "Mercantile" given on May 23, which was of itself a qualification of the limitation of its undertaking.

Assuming *argumentae* that the "aval" could be construed as a banking guaranty, we submit that even then there is no reason why a national bank should receive a more favorable interpretation of applicable law and be excused from the consequence of withdrawing its guaranty and breaching its contract, in fact, if it had actually given one, particularly after the money had been sent and ordered to be paid by "Banque Francaise".

## The Law Applicable

The Supreme Court of the United States has held that where one person receives funds for the benefit of another, the receiving party does not acquire title to the funds, but title belongs to the party for whose benefit the funds were received:

> "* * * where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter." *McKee* v. *Lamon*, 159 U. S. 317, 322 (1895); *Brown* v. *J. P. Morgan & Co.*, 265 App. Div. 631, aff'd 295 N. Y. 867, 67 N. E. 2d 263; *Rogers Locomotive Works* v. *Kelley*, 88 N. Y. 234; *Sayer* v. *Winkoop*, 248 N. Y. 54, 161 N. E. 417.
>
> *Okeechobee County* v. *Florida National Bank of Jacksonville*, 145 Fla. 486, 1 So. 2d 263 (1941).

In that case, the funds had come to the bank from a third party for the benefit of the County of Okeechobee. This Court held that the bank having received the money, had no other option under the law than to deliver the funds to the beneficiary. The fact that the receiving bank had transferred the funds to another bank did not relieve the receiving bank of the obligation to pay the beneficiary even subsequent to the insolvency of the bank to which the funds had been transmitted.

Under the apparently well established and well settled law of Florida, title to the funds vested in the *cestui que trust*, Pierre Bourgeois, the instant the funds were sent by Banque Francaise du Commerce Exterieur.

In the third *Okeechobee* case, *supra*, this Court held that although the contracted guarantee was void, the bank would, nevertheless, be held for its assumption of obligations as constructive or resultant trustee. This Court held that the failure to deliver the fund to the beneficiary was not such an act as could abrogate the contract between the

bank as trustee, and the beneficiary for whom it had agreed to receive the funds. This Court said:

> "This duty could not be fulfilled by the Florida National Bank by merely paying the money to the other joint trustee * * * but the duty still existed to see that the money is returned to the *cestui que trust*, due consideration being given to the fact that the banks were held to be constructive or resulting trustees and not voluntary trustees of the funds." *Okeechobee County* v. *Florida National Bank*, 145 Fla. 496, 1 So. 2nd 263, 273.

The Mercantile National Bank having been guilty of bad faith, breach of contract, and tort in its conduct, fiduciary or otherwise, with its customer, the petitioner, it is liable in damages.

The text writers and the decisions fully sustain this contention of plaintiff.

*90 Corpus Juris Secundum 834*;
*Lewine* v. *National City Bank*, 248 N. Y. 365, 373, 162 N. E. 284;
*Emmerich* v. *City Farmers Bank & Trust Co.*, 300 N. Y. 417, 91 N. E. 2nd 868;
*Madison Trust Co.* v. *Carnegie Trust Co.*, 215 N. Y. 475, 109 N. E. 580;
*Brill* v. *Tuttle*, 81 N. Y. 455;
*Grace* v. *Corn Exchange Bank*, 287 N. Y. 94, 38 N. E. 449;
*Munn* v. *Boasberg*, 292 N. Y. 519, 54 N. E. 2nd 205;
*Fidelity & Casualty Co.* v. *Farmers National Bank*, 275 N. Y. 195, 205, 9 N. E. 2nd 833;
*Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 114, 112 N. E. 759;
*Martin* v. *First National Bank*, 51 F. 2nd 840 (D. Minn.);
*Strauss* v. *U. S. Fidelity Co.*, 63 F. 2nd 174 (4th Cir.);

*Marcus* v. *Otis*, 168 F. 2nd 649 (2nd Cir.);
*In re The Van Sweringen Co.*, 119 F. 2nd 231, *Cert. denied*, 314 U. S. 671;
*Gaines* v. *Miller*, 111 U. S. 395;
*Millett* v. *Omaha National Bank*, 30 F. 2nd 665 (8th Cir.);
*Colby* v. *Riggs Bank*, 92 F. 2nd 183 (D. C. Cir.);
*Lonsdale* v. *Speyer*, 249 App. Div. 133;
*Jacobellis* v. *Prudential Ins. Co.*, 244 App. Div. 255, *aff'd* 269 N. Y. 632, 200 N. E. 32.

In Scott Trusts, Section 226:

"Where the trustee makes payment of trust funds or conveys trust property to a person other than the beneficiary entitled to the money or other property, he is liable to the beneficiary, unless the payment or conveyance was authorized by a proper court. This is true, of course, where he intentionally makes a payment or conveyance to the wrong person. It is also true where he reasonably believes that the person to whom he makes the payment or conveyance is entitled thereto."

In Restatement of the Law of Trusts, Section 326:

"A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."

In 26 Ruling Case Law 1322:

"All persons knowingly participating in, or aiding in, committing a breach of trust, or in the misapplication of trust funds are equally liable with the trustee to make good the fund by returning it to the trust estate."

In *Raymond Concrete Pile Co.* v. *Federation Bank*:

> "Nor can a bank be a privy to a diversion of such a fund, though disinterested in it and be absolved from liability for the loss." 288 N. Y. 452, 458, 43 N. E. 2nd 486, 489.

In *Wechsler* v. *Bowman*:

> "Anyone who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust." 285 N. Y. 284, 291, 34 N. E. 2nd 322, 326.

In *Union Stock Yards Bank* v. *Gillespie*:

> "Here the beneficial owner was the Gillespies; the legal title was in the Rappels; but when they deposited with the bank, the latter received the moneys with notice that the beneficial interest was elsewhere than in the Rappels. It could not in equity take them and cancel their private debt to it." 137 U. S. 411, 423.

In *National Bank* v. *Insurance Co.*:

> "But it cannot be permitted to prevail against the equity of a beneficial owner, of which the bank had notice, either actual or constructive." 104 U. S. 54, 71.

## CONCLUSION

**For the reasons set forth above, we respectfully submit that this Court should issue its writ of certiorari to the Supreme Court of Florida.**

Respectfully submitted,

JACOB RASSNER,
*Attorney for Petitioner.*

## Appendix

## Final Judgment of November 15, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law—Case No. 33803

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[SAME TITLE]

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The above-styled cause coming on for trial before me, without a jury, trial by jury having been duly waived, and the court having heard the testimony and evidence offered by the respective parties, and Defendant having duly moved for a directed verdict or finding in favor of said defendant at the close of the Plaintiff's case, and the Court having heard argument of counsel, and being duly advised in the premises, finds as a matter of law, upon the undisputed testimony and evidence offered by said Plaintiff that said Plaintiff is not entitled to recover upon his Amended Complaint in the above-styled cause, nor upon either count thereof, and that defendant is entitled, as a matter of law, to final judgment, it is therefore:

CONSIDERED, ORDERED AND ADJUDGED that said Amended Complaint of Plaintiff, Pierre Bourgeois be and same is hereby dismissed, with prejudice, and at Plaintiff's costs, and that Plaintiff take and recover nothing of and from said defendant, Mercantile National Bank of Miami Beach, Florida, a United States Corporation, upon his said Complaint, and that said defendant recover its costs, to be taxed upon motion and notice.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this 15th day of November, 1955.

VINCENT C. GIBLIN,
*Circuit Judge.*

## Judgment

IN THE

# CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 33803-G

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[SAME TITLE]

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Miami, Florida,
Tuesday, November 15, 1955.

The above-entitled cause came on for further hearing before the Hon. Vincent C. Giblin, Judge of the above-styled Court, at his office in the Courthouse, Miami, Florida, on Tuesday, November 15, 1955, at 1:30 o'clock p. m. pursuant to adjournment on Saturday, November 12, 1955.

Appearances:

FRED KLEIN, Esq., and
GERARD EHRICH, Esq.,
Attorneys for plaintiff.

L. J. CUSHMAN, Esq., and
LEWIS HORWITZ, Esq.,
Attorneys for defendant.

---

The Court: I will hear argument of counsel now on the motion before the Court.

(Thereupon counsel argued to the Court.)

The Court: I will grant the pending motion. I think there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant.

(Thereupon the case was concluded.)

# Opinion of Supreme Court of Florida

IN THE

## SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

SPECIAL DIVISION B

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Case No. 28,495

---

PIERRE BOURGEOIS,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Appellee.

---

Opinion filed June 5, 1957.

An Appeal from the Circuit Court for Dade County, Vincent C. Giblin, Judge.

Rassner, Miller & Roth, for Appellant.

Broad & Cassel and L. J. Cushman, for Appellees.

PER CURIAM:

Affirmed.

TERRELL, *C.J.*, THORNAL & O'CONNELL, *JJ.*, & SANDLER, *Associate Justice*, Concur.

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JOHN T. FEY, Clerk

# Supreme Court of the United States

October Term, 1957

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## No. 424

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PIERRE BOURGEOIS,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Respondent.

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

---

LEWIS HORWITZ,
420 Lincoln Road
Miami Beach 39, Florida
and
L. J. CUSHMAN
706 Ainsley Building
Miami 32, Florida
Attorneys for Respondent

BROAD & CASSEL
420 Lincoln Road
Miami Beach, Florida
Attorneys for Respondent

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# Supreme Court of the United States

October Term, 1957

## No. 424

PIERRE BOURGEOIS,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PIERRE BOURGEOIS seeks by Certiorari to review a decision and judgment of the Supreme Court of Florida in a certain cause entitled **Pierre Bourgeois**, Appellant, vs. **Mercantile National Bank of Miami Beach**, Florida a United States corporation, Appellee, **95 So. 2d. 918.**

### No Jurisdiction Shown

Petitioner contends that jurisdiction to review the decision or judgment of the Supreme Court of Florida **[Bourgeois v. Mercantile National Bank, 95 So. 2d. 918]** is conferred by Section 1254, and sub-sections 2 and 3 of Section 1257, Title 28 USCA, but we respectfully submit

that neither the petition for certiorari, nor the record shows jurisdiction under the Sections claimed, nor under any other statute, rule, or law.

We submit that Section 1254, Title 28 USCA, has no application to this case, and confers no jurisdiction upon this Court to review the judgment [Bourgeois v. Mercantile National Bank 95 So. 2d. 918] of the Supreme Court of Florida, because that Section applies only to "cases in the courts of appeal" created pursuant to Sections 41-48, Title 28 USCA, and has no application to "Final Judgments or decrees rendered by the highest court of a state," in the case at bar, the Supreme Court of Florida, which is governed by Section 1257, Title 28 USCA. Therefore, we submit that Section 1254, Title 28 USCA. must be dismissed from consideration as basis for a claim of jurisdiction in the case at bar.

Apparently Petitioner contends that juridiction of this proceeding is conferred by sub-sections 2 and 3 of Section 1257 Title USCA, and that some unspecified section or sections of the National Banking Act [Title 12, Section 21 et seq. USCA] was involved in the judgment or decision (Bourgeois v. Mercantile National Bank, 95 So. 2d. 918) of the Supreme Court of Florida sought to be reviewed, but Petitioner's counsel have failed to point out or specify any "Federal question" which was ever raised "in the court of the first instance" or "in the appellate court" as required by the Rules [Rule 23(1) (f) Sup. Ct. Rules] of this Court. Indeed, we respectfully submit that no Federal question involving "the validity of a statute of any State", or " the validity of a treaty or statute of the United States", or " a State Statute" upon Constitutional grounds as required by the Statute [Sec.

1257 (2) and (3) Title 28 USCA] appears in the case at bar, either from the Petition for Certiorari, the Record, or the Brief of Petitioner's Counsel. We respectfully submit that there is no "Federal question" presented by the Petition, Record or Brief, as required by the rules [Rule 19(1) (a) Sup. Ct. Rules] of this Court.

The learned authors of Robertson & Kirkham on **Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, briefly and succinctly state the requirements for jurisdiction (page 50) as follows:

> "* * * a record from a state court which will support the jurisdiction of the Supreme Court must show:
>
> (1) That there is a final judgment or decree;
>
> (2) That the decision sought to be reviewed is by the highest court of the state in which decision could be had;
>
> (3) That the case presents a substantial federal question;
>
> (4) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and,
>
> (5) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree.

The requirements just enumerated are the same whether review of the state court is sought by certiorari or appeal."

**Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, Sec. 22, page 50.

In **HERB v. PITCAIRN, 324 US 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789,** Mr. Justice Jackson speaking for the Court said:

"* * * Third., This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citing cases.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion. * * * It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on adequate and independent grounds in state law."

And,

> " 'Mere allegation of a Federal question' will not suffice; 'there must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction' of the Supreme Court. The rule is usually referred to as the requirement of a 'substantial federal question.' "
>
> Robertson and Kirkham, **Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, Sec. 58, p. 102.

We concede the presence of the first two requirements for jurisdiction, that is, a "final judgment" by the "highest court of the state," but none of the remaining three essentials are present in this case as a review of the facts will demonstrate.

## The Facts

The facts shown by the record[1] are these:

Plaintiff, PIERRE BOURGEOIS, was a native of France, educated in France, and held a degree of Doctor of Civil Law. (A: 55, 79-80) The facts, as stated by plaintiff himself, were these:

On May 16, 1955 (A: 65) Bourgeois and his attorney,

---

[1]In our statement of the facts we shall employ the following symbols, which were employed in the Court below: "A" for "Appendix of Appellant," which refers to the printed Appendix filed as part of the record in this Court; "PX" for "Plaintiff's Exhibit"; "DX" for "Defendant's Exhibit" and "R" for "Record on Appeal."

Rubenstein, met Mr. Hudson, an Assistant Vice President (A: 22) of defendant Bank, at a restaurant in Miami Beach (A: 65-66). Later the same day, (A: 66) Bourgeois went to defendant Bank, and presented to Hudson this proposition: Bourgeois was expecting to receive $228,-570.00 (A: 66) from the Bank of France, for which he would give a receipt in the form of a note, (DX-4D, A: 104) In order to meet the regulations of the Bank of France, it was necessary that the Bank of France receive an "aval" from defendant Bank, which Bourgeois said (A: 66 )"is not a guarantee". Following that initial conversation (A: 66) between Bourgeois and Hudson, there was an exchange of letters (PX-1A; PX-1C, A: 98-99) and cablegrams (PX-1B, A: 98; PX-1D, A: 99 and PX-1E, A: 100) which neither plaintiff (A:91) nor defendant Bank (A: 41-44) understood or considered to be an agreement by defendant Bank to guarantee any obligation of plaintiff, Bourgeois.

On May 31, 1955, by telegram (DX-D1, A: 101-102) **FIRST NATIONAL CITY BANK OF NEW YORK,** on behalf of the Bank of France, notified defendant Bank that it was depositing to the credit of defendant Bank in **CHASE MANHATTAN BANK** the sum of $228,-570.00, which said telegram (DX-D1, A: 101-102) including the instructions of the Bank of France, pursuant to which said deposit was made, read as follows according to the translation (DX-D1A, A: 102-103):

> "We have received the following cable from Banque Francaise du Commerce Exterieur Paris France for transmission to you 'WE HAVE RECEIVED YOUR CABLE READING AS FOLLOWS: MERCANTILE MAKES IRREVOC-

ABLE AGREEMENT TO REIMBURSE DRAFT DOLLARS 228,570 DESCRIBED OUR LETTERS MAY SIXTEENTH TO YOU AND CIOTAT WHICH CONSTITUTES OUR GUARANTEE IN FULL. **WE TAKE NOTICE THAT YOU GUARANTEE NONCONDITIONALLY THE REIMBURSEMENT AT DUE DATE OF A NOTE HELD BY YOU OF DOLLARS 228,570 SUBSCRIBED BY PIERRE BOURGEOIS OF NEW YORK TO THE CHANTIERS NAVALS DE LA CIOTAT STOP IN THESE CONDITIONS WE HAVE BEING TRANSFERRED BY CITIBANK NEW YORK DOLLARS 228,570 TO BE CREDITED TO THE ACCOUNT WITH YOUR BANK OF PIERRE BOURGEOIS** SIGNED EXTECOMEX' STOP **In accordance with the foregoing we will transfer on June 1 to you** through Chase Manhattan Bank of New York **$228,570.00** without responsibility on our part.

FIRST NATIONAL CITY BANK
OF N. Y."

After the receipt of the telegram (DX-D1) notifying defendant Bank that the sum of $228,570 had been deposited to its account subject to the conditions stipulated therein by the Bank of France (See: Translation—DX-D1A) Hudson testified (A: 47) that a conference was held in the office of Alvin Cassel, attorney for defendant Bank, relating to the release of the $228,570 to Bourgeois. The telegram of transmittal (DX-D1) and the translation (DX-D1A) were both before the parties at that conference, and (A: 48) were discussed.

Bourgeois and his attorney, Rubenstein, tried to convince Cassel (A: 48) that the telegram (DX-D1) did not require defendant Bank to guarantee payment of Bourgeois' note. (DX-D4, A: 104) Cassel informed Bourgeois and his attorney (A: 48-49) that if they secured written confirmation from the Bank of France that there was no obligation on the part of defendant Bank to pay Bourgeois' note (DX-D4), the funds would be released, but not otherwise. However, such confirmation was never obtained (A: 49). Subsequently, defendant Bank notified the Bank of France that the transfer having not been made upon the terms expected, defendant Bank was compelled to withdraw (A: 49-50; DX-D3, A: 103) The Bank of France requested (A: 51-52) the return of said fund ($228,570) and it was returned. Defendant Bank having refused to comply with plaintiff's demand (A: 73-75) to pay the fund ($228,570) over to him, he filed this suit seeking (A: 13-16) recovery of said fund, and from the adverse judgment (A: 105) he has appealed. (R: 575)

During the examination of Plaintiff, Bourgeois, at the trial in the Circuit Court (A: 90, 91,) the following transpired:

**By Mr. Cushman:**

**Q.** Just a moment. I am going to ask you the question again and ask you to listen to it, please. Do you claim and do you contend now in this case that the Mercantile National Bank ever made an agreement or assumed an obligation to pay the note of Pierre Bourgeois in the sum of $228,570 on December 13, 1955, if you, Pierre Bourgeois, failed to pay it for any reason whatsoever, and I will ask you first now, do you understand my question? [109] A. I understand your question.

**By Mr. Cushman:**

**Q.** Do you understand the question? **A.** Well—

**Q.** Yes or no; do you contend that the Mercantile National Bank obligated and bound itself to pay your note on [110] December 13, 1955 if you did not pay it; that is my question?

* * *

**The Court:** The witness may confer with counsel if he wishes before answering the the question.

**The Witness:** All right.

(Thereupon the witness conferred with counsel.)

**Mr. Rassner:** I think the witness has the question in mind. Would you mind answering?

**The Witness:** Well, I consider that an aval is not a guarantee, and the test of the cable received and repeated by the bank is supposedly evidence of what it meant.

**By Mr. Cushman:**

**Q.** You do not contend that the Mercantile National Bank ever undertook to guarantee payment of your note on December 13, 1955, if you failed to pay it? **A.** It was not necessary. I had money due to me several times that

much, and we had to do it because of the regulation in France.

Q. Your answer is no; no, you did not expect the guarantee of the payment of any note at all; is that your answer?

The Court: Yes; that is his answer.

Thus, it is clear that Petitioner, Bourgeois, did not claim or contend that MERCANTILE NATIONAL BANK of MIAMI BEACH had in fact ever promised to guarantee payment of his note (DX-D4, A: 104) at maturity, and it is equally clear from an examination of the telegram by which the funds were transmitted (DX-D1A, A: 102) that the Bank of France imposed a condition upon its transfer of funds which neither the Bank nor Bourgeois had agreed upon, that is, that the Bank guarantee payment of Bourgeois' note at maturity, and since the Bank was unwilling to make such a guarantee, it so advised the Bank of France (DX-D3, A: 103) and refused to accept the funds.

## No Federal Question Involved

Upon the foregoing facts the legal principles which controlled the decision of this cause in the lower courts involved no "substantial federal question," indeed, no "federal question" at all, as a brief consideration of the facts and controlling principles will reveal.

The plain purpose of the telegram (DX-D1, as translated: DX-D1A) was to state the conditions, on which the Bank of France deposited the sum of $228,570 to the credit

of defendant Bank; in other words, the conditions on which the Bank of France made a special deposit. Under repeated decisions of the Supreme Court of Florida, the deposit by the Bank of France of the sum of $228,570 to the credit of defendant Bank subject to the conditions set forth in said telegram (DX-D1A) constituted a special deposit of that fund.

In **BRYAN v. COCONUT GROVE BANK & TRUST CO., 101 Fla. 947, 132 So. 481**, Chief Justice STRUM, speaking for the Court (Text 484-485) said:

> "Whether a deposit in a bank is general or special depends upon the contract resulting from the mutual understanding and intention of the parties with reference thereto. **The law prescribes no particular formula of contract. Like all contracts, a contract of special deposit, or deposit for a specific purpose, grows out of the mutual intention and understanding of the parties. The purpose and terms of the deposit may be fixed by express agreement, or the intention of the parties may be inferred from their declarations at the time the deposit was made, considered in connection with their conduct and all the other circumstances.** Northern Sugar Corp. v. Thompson, supra; Fogg v. Tyler, 109 Me. 109, 82 A. 1008, 39 L.R.A. (N.S.) 847, Ann. Cas. 1913E, 41; Johanna Paulina Carlson v. M.B. Kies, 75 Wash. 171, 134 P. 808, 47 L.R.A. (N.S.) 317; 3 R.C.L. 517. * * *
>
> Where the depositor, at the time the deposit is made, enters into an agreement with the bank,

or the bank receives and accepts the deposit with instructions from the depositor that the money so deposited is for a specific purpose, and for that alone, such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that of principal and agent. **Title to the deposit remains in the depositor.** Under such circumstances, therefore, the relation of debtor and creditor does not exist. Northern Sugar Corp. v. Thompson (C.C.A.) 13 F.(2d) 829; Morton v. Woolery, 48 N.D. 1132, 189 N.W. Miss. 363, 75 So. 131, L.R.A. 1918A, 61, Ann. Cas. 1918B, 388; American Bank & Presnall, 58 Kans. 69, 47 P. 556."

In **TINSLEY v. AMOS**, 102 Fla. 1, 135 So. 397, Chief Justice BUFORD said:

"Where the depositor, at the time the deposit is made, enters into an agreement with the bank, or the bank receives and accepts the deposit with instructions from the depositor that the money so deposited is for a specific purpose, and for that alone, such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that of principal and agent. **Title to the deposit remains in the depositor.** Under such circumstances, therefore, the relation of debtor and creditor does not exist. Northern Sugar Corporation v. Thompson (C.C.A.) 13 F(2d) 829;

Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232, 24 A.L.R. 1107; Sawyers v. Conner, 114 Miss. 363, 75 So. 131, L.R.A. 1918A, 61 Ann. Cas. 1918B, 388; American Bank v. Presnall, 58 Kan. 69, 48 P. 556.

**'If the purpose for which a special deposit was accepted by a bank cannot be accomplished, the bank is liable to the depositor for the return of the funds.** American Bank v. Loretta Co. 165 Ill. 103, 46 N.E. 202, 56 Am. St. Rep. 233; Mester v. Quincy Bank, 163 Ill. App. 645; Morse on Banks & Banking (6th Ed.) ¶ 208.'"

The funds in question ($228,570.00) were deposited subject to the express understanding, and conditions stipulated by the depositor, the Bank of France, for its benefit in the telegram (DX-D1A) by which it notified defendant Bank of the deposit, that is, upon the understanding:

"* * * that you [defendant Bank] guarantee nonconditionally the reimbursement at due date of a note held by you of dollars 228,570.00 subscribed by Pierre Bourgeois of New York to the order of Chantiers Navals de la Ciotat * * *"

and, the Bank of France continued:

"In these conditions [ie, upon these conditions] we have being transferred by CitiBank New York dollars $228,570.00 to be credited to the account with your bank of Pierre Bourgeois * * *"

This was a plain stipulation that upon condition that defendant Bank unconditionally guarantee payment of Bourgeois' note in accordance with the understanding of the Bank of France to that effect, the funds were being transferred. The transmitting bank, FIRST NATIONAL CITY BANK, made it clear that said fund was being transferred upon that condition, in these words:

> **" * * * in accordance with the foregoing we will transfer on June 1 to you through Chase Manhattan Bank New York N Y $228,570.00 without responsibility on our part."**

Plaintiff's counsel has not attempted in their brief to suggest any other construction of the telegram. (DX-D1A). In **9 CJS "Banks and Banking"—678** it is stated:

> **"Special Deposits.—Where money is specially deposited to be paid on a condition imposed for the depositor's benefit, the bank has no right to pay any part of such money on the depositor's check until the condition is complied with."**
> **9 CJS "Banks and Banking"—678**

So, in the case at bar, the $228,570 was a "special" deposit, and defendant Bank had no right to pay out any of the fund until the condition stipulated by the depositor was complied with—that is, until defendant Bank agreed to unconditionally guarantee payment of Bourgeois' note at maturity in accordance with the stipulation of the Bank of France to that effect.

## Neither Plaintiff Nor Defendant Acquired Title or Right to Possession of the Fund.

There can be no doubt that the telegram (DX-D1A) stipulated the conditions upon which the depositor, the Bank of France, was transferring the funds. Unless those conditions were met, unless defendant Bank agreed to unconditionally guarantee payment of Bourgeois' note at maturity in accordance with the understanding of the Bank of France to that effect, the title and right to possession of the funds remained in the depositor, the Bank of France:

> **"Title and Interest of Bank—The title to a special deposit** does not pass to the bank but **remains in the depositor.** The depositor does not part with the legal possession or the right of control and disposition."
> **5B Michie on BANKS and BANKING—p. 254-255** Citing: City Bank v. Hart, 102 Fla. 529 136 So. 446; Martin v. Meyerheim, 101 Fla. 82, 133 So. 636; Bryan v. Coconut Grove Bank, etc. Co. 101 Fla. 947, 132 So. 481, 134 So. 229.

In **BRYAN v. COCONUT GROVE BANK & TRUST CO., supra,** the Court said:

> "* * * such deposit partakes of the nature of a special deposit, being sometimes called a 'specific deposit', and the relation between the depositor and bank with reference to such deposit is that

of principal and agent. **Title to the deposit remains in the depositor."**

Defendant Bank never claimed any title or right t said fund ($228,570) because it admittedly had no lega authority to comply with the stipulated condition, and admittedly, had never undertaken nor agreed to guar antee Bourgeois' note.

**The Bank Could Not Accept Nor Pay Out the Fund.**

The learned trial judge in announcing his decisio (A: 96) said:

**"The Court:** I will grant the pending motion. I think **there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.**

**I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note** which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many

objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant."

Clearly, under the law of Florida, the title and right to possession of the fund remained in the depositor the Bank of France. It is conceded by counsel on both sides that defendant Bank could not legally become a guarantor of Bourgeois' note under the National Bank Act, and in any event it never did undertake or agree to do so. Under those circumstances, simple honesty forbade defendant Bank to pay out any of that fund to Bourgeois. Had defendant Bank done so without any intention whatever of guaranteeing Bourgeois' note, but intending instead to deny its power to make such a guaranty the Bank would have been guilty of a bald-faced fraud under the rule stated in 23 Am. Jur. "Fraud and Deceit," 885-887:

"§106. Majority Rule.—A majority of American courts hold that fraud may be predicated on promises made with a present intention not to perform them, or, as the rule is frequently expressed, on promises made without an intention of performance, and that for such fraudulent promise, relief may be had in equity or law, as

the circumstances and issues presented demand. **Recourse may therefore be had for such promises, made for the purpose of deceiving the promisee and inducing him to act, where otherwise he would not do so, in such a way as to affect his legal right or to alter his position to his injury or risk, as by making and entering into disadvantageous contracts or in some way giving over, transferring, or surrendering real or personal property or rights therein to the person who makes the fraudulent promise. The gist of the fraud in such cases is not the breach of the agreement to perform, but the fraudulent intent of the promisor, the false representation of an existing intention to perform where such intent is in fact nonexistent, and the deception of the obligee by such false promise."**

A bank exists only by virtue of public confidence in the honesty of its officers and agents. A bank which would agree to guarantee its customers' obligation notwithstanding its legal incapacity to do so would be dealing dishonestly, but even so, a bank cannot repudiate its obligation or escape liability upon such a guarantee where others have parted with their funds in reliance upon it. For instance, in **STOCKYARDS NAT. BANK v. BROWN, 81 Colo. 331, 255 Pac. 624,** the bank had contracted to guarantee its customers' notes, and when sued on its guaranty, pleaded ultra vires, but ADAMS, J., speaking for the Court (Text 624-625) rejected that defense, saying:

**"The evidence of the original guaranty was sufficient;** it was corroborated by the subsequent actions of the parties, showing that such was

the understanding; **but plaintiff claims that such guaranty is ultra vires under the National Banking Act** (U. S. Comp. St. Sec. 9657 et seq.) **However, even if ultra vires, the Stockyards National Bank of Denver is liable to the extent of the benefit derived.** McCormick v. Market Bank, 165 U. S. 538, 17 S. Ct. 433, 41 L. Ed. 817; McFerson v. Kepner, 76 Colo. 523, 233 P. 148, and cases there cited. To the same effect, see Citizens' National Bank v. Appleton, 216 U. S. 196, 30 S. Ct. 364, 54 L. Ed. 443."

The learned trial judge was correct when he declared [A: 96] that:

"* * * the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as guarantor."

## The Simple Point Upon Which the Case Turned

As we have shown, Plaintiff and Defendant were in agreement that Bourgeois had never requested the Bank to guarantee payment of his note at maturity, and the Bank had never agreed to do so.

Nevertheless, the Bank of France, without regard to the wishes of either Bourgeois, or the Bank, transmitted the funds by the telegram of May 31, 1955 [Page 6 supra] **subject to the condition,** inserted by the Bank of France for its benefit, **that Mercantile National Bank of Miami Beach unconditionally guarantee payment of Bourgeois note at maturity,** and "upon that condition" it trans-

mitted the funds ($228,570) to the Mercantile National Bank of Miami Beach. This "condition" inserted by the Bank of France for its sole benefit was never accepted by Mercantile National Bank of Miami Beach; it declined to accept transfer of the funds upon that condition, and accordingly, cabled the Bank of France (DX-D2, A: 103) that the "transfer having not been made as demanded and expected" it was compelled to withdraw from the transaction. The trial court held that the Bank was not compelled to accept the funds, subject to a condition to which it had never agreed, and could not lawfully agree, and thereby subject itself to possible liability as a guarantor, and that it was not liable to Bourgeois for its refusal to accept said funds and pay same over to him under those circumstances. The Supreme Court of Florida affirmed the judgment without opinion. We confidently submit that no "substantial federal question" was involved in this case, or indeed any "federal question" but on the contrary that the decision of the Supreme Court of Florida rests entirely upon non-federal grounds.

## Petitioner's Brief

Petitioner argues that where one person receives funds for the benefit of another, the receiving party does not acquire title to the funds, but title belongs to the party for whose benefit the funds were received. [Petitioner's Brief, p. 9].

For the purpose of this argument, let us concede that the proposition just stated is a correct principle of law. We fail to see how that aids Petitioner in the least. In the first place, the principle as stated is not embodied in any "statute" of the United States so far as we are

aware, nor is it peculiarly a principle of "federal" law, rather than "state law." Unless the decision of the Florida Supreme Court turned upon and involved a "substantial federal question" or if the decision of the Florida Supreme Court rested upon a "non-federal" ground, as we are confident it did, then that ends this case, and the Petition for Certiorari should be denied. In the **second** place, the admitted facts, as we have related them, show that under the law of Florida, the transfer or transmittal of the funds ($228,570) subject to the condition that Mercantile National Bank of Miami Beach unconditionally guarantee payment of Bourgeois' note in that amount at maturity constituted a "special deposit", and under the law of Florida, neither Bourgeois nor Mercantile National Bank of Miami Beach acquired any title or right to possession of the fund ($228,570) unless or until said Bank accepted the condition which it had never agreed to accept, never did accept, and could not lawfully agree to accept. Mercantile National Bank never claimed nor acquired title to said funds ($228,570) and under the law of Florida, title remained vested in the special depositor [The Bank of France] until Mercantile National Bank accepted and agreed to the condition stipulated by said depositor, hence, the principle urged by Petitioner never became applicable to the case at bar.

## CONCLUSION

At the threshold of this case we are met with the question of the jurisdiction of this Court to review the decision of the Supreme Court of Florida. **[Bourgeois v. Mercantile National Bank of Miami Beach** (Fla.) **95 So. 2d. 918]**. The burden rests upon Petitioner to show by the record and his Petition:

"(3) That the case presents a substantial federal question;

(4) That the federal question sought to be reviewed was properly raised and preserved in the state courts; and,

(5) That the decision of the highest court of the state does not rest upon a state ground which independently and adequately supports the judgment or decree."

**See: Jurisdiction of the Supreme Court of the United States,** by Richard F. Wolfson and Philip B. Kurland, **Sec. 22, p. 50.**

We submit that Petitioner has utterly failed to show any one of these three (3) requirements for jurisdiction, and that it is apparent that the judgment sought to be reviewed rests upon adequate non-federal grounds, and hence, his petition should be denied for want of jurisdiction.

On the other hand, we submit that the decision of the trial court, and the Supreme Court of Florida, were correct as a matter of law, and in any event, said Petition should be denied.

Respectfully Submitted,

Lewis Horwitz

L. J. Cushman

Attorneys for Respondent

LEWIS HORWITZ,
420 Lincoln Road
Miami Beach 39, Florida
and
L. J. CUSHMAN
706 Ainsley Building
Miami 32, Florida
Attorneys for Respondent

BROAD & CASSEL
420 Lincoln Road
Miami Beach, Florida
Attorneys for Respondent

I do certify that a copy hereof has been furnished

To Hon. Jacob Rassner

by (~~delivery~~) (mail) this 20 day

of Sept., 1957

L. J. Cushman

By L. J. Cushman

Attorney

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# Supreme Court of the United States

**October Term, 1957**

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**No. 424**

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**PIERRE BOURGEOIS,**

***Petitioner,***

**—v.—**

**MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,**

***Respondent.***

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## PETITION FOR REHEARING OF DECISION

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JACOB RASSNER,
*Attorney for Petitioner.*

# Supreme Court of the United States

**October Term, 1957**

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PIERRE BOURGEOIS,

*Petitioner,*

—v.—

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

*Respondent.*

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## PETITION FOR REHEARING OF DECISION

**AT THE OUTSET WE RESPECTFULLY SUBMIT TO THE COURT THAT THIS APPLICATION FOR RECONSIDERATION OF PETITIONER'S APPLICATION FOR THE WRIT OF CERTIORARI IS MADE FOR REVIEW OF THE QUESTION OF LAW BECAUSE THE PETITIONER CAN ONLY HAVE REVIEW OF HIS RIGHTS IN THE INTERNATIONAL COURT OF JUSTICE AT THE HAGUE IN THE EVENT THIS HONORABLE COURT DOES NOT ENTERTAIN PETITIONER'S APPLICATION FOR THIS WRIT OF CERTIORARI, THAT BEING A PREREQUISITE FOR CONSIDERATION BY THE INTERNATIONAL COURT OF JUSTICE.**

Petitioner respectfully submits the question involved is a simple one without any substance to any suggestion that what the respondent-bank undertook might be considered outside the scope of the respondent-bank's powers in law. That the entire undertaking by the respondent-bank was carried in accordance with the commonly accepted com-

mercial manner in which funds from outside cities are deposited and paid out. In this instance, the petitioner, was the owner outright of the funds on deposit in respondent's bank as evidenced in the course of the trial of the written transfer for petitioner's account. The respondent bank having undertaken and acknowledged the petitioner as the owner thereof, it was entirely without power in law and has no right to disburse these funds except upon the express request of the petitioner, which request was not made in this instance.

That in the brief of the respondent in opposition to petitioner's application for a writ of certiorari, reference is made to the Bank of France, which is the bank of issue of the French Government. This is clearly a misstatement. The bank involved in France was the Banque Francaise du Commerce Exterieur, which in France is, one of a number of commercial banks and not to be confused with the Bank of France.

Petitioner submits that the trial Court grievously erred in the very hasty decision given from the bench immediately upon conclusion of the trial, in view of the issues involved.

The petitioner is not as stated in the respondent's brief on the original application, a French national. Petitioner is and was prior to the trial a citizen of the United States, and the transaction having been based on the improper transfer of petitioner's deposit by the respondent-bank, the petitioner should be given the opportunity of a full, complete review of petitioner's rights in the United States Court, and not be compelled to seek relief in a foreign jurisdiction.

If petitioner, as was represented to the Court by respondent, was a French national, instead of the fact that he is a United States citizen, petitioner would have no problem in having a complete legal examination of all of the facts in this matter before the International Court of

Justice of the Hague. The petitioner firmly believes that as can be demonstrated beyond any doubt that he, a United States citizen had his own money deposited in a bank chartered and established in the United States, and he should apply to have a complete review of his rights in this United States Supreme Court.

The petitioner respectfully submits that the decision of the Trial Court deprived him of his own property located in this country, in effect attempted to cloak with judicial right the action of the respondent bank in disbursing petitioner's moneys without his request or consent and indeed over his objection, quoting from the testimony of the plaintiff's witness, officer of respondent bank:

> "[11] 'Q. What coded message are you referring to? A. I am referring to the coded message where the Chase Manhattan Bank of New York advised us that our account had been credited $228,570 for the account of Pierre Bourgeois to be established with us.'" (Appendix for appellant Page 26, lines 19-23 inclusive.)

To deny this application would put the petitioner, a citizen of the United States, in the position of having to try what is in effect a domestic commercial case before a foreign tribunal.

The entire transaction as presented to the trial Court in Florida concerned an everyday banking problem of the utmost simplicity, namely, that the respondent bank accepted a deposit for petitioner's account under date of June 1, 1955, and simultaneously accepted from the depositor a non-negotiable promissory note to the order of Chanters Navals de la Civtat, in the same amount, said promissory note by its terms due December 13, 1955, and throughout the trial and as appears in the exhibits offered, the respondent-bank undertook with respect to the note to hold the note for the account of the payee and guarantee

that such moneys (as will be paid on the note) would be forwarded to the payee payable in United States funds drawn on a New York bank, New York, United States of America.

Petitioner submits that an examination of the testimony and the exhibits offered in the trial explicitly shows a breach of trust on the part of the respondent-bank toward the petitioner, which standing of itself would constitute extreme negligence, but petitioner in the trial in his testimony has endeavored to conclusively prove his substantiated understanding that the alternative answer to negligent stupidity could only have been an act of conspiracy to deprive petitioner of his property.

Petitioner firmly believes that his case is fully identical and covered by the law in the decision in the case of *Lewine* v. *National City Bank*, 248 N. Y. 365.

Respectfully submitted,

JACOB RASSNER,
*Attorney for Petitioner.*

Dated: New York, New York,
December 6, 1957.

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## Certificate

*To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:*

Honorable Sirs:

The undersigned attorney for the pettioner hereby certifies that the Petition for Rehearing of Decision herein is presented in good faith and not for the purpose of delay.

Respectfully submitted,

JACOB RASSNER,
*Attorney for Petitioner,*

Dated, New York, New York, December 6, 1957.